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A LEGAL HISTORY OF NATIONAL SECURITY LAW AND INDIVIDUAL RIGHTS IN THE UNITED STATES

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INTRODUCTION

Every time I have read the Constitution of the United States—and I have done so several times a year for more than forty years—I have been left with the inescapable impression that the Framers were decidedly more fearful of the pains of a loss of liberty than the ignominy of a loss of security. What has become to us a dichotomy—liberty versus security—was for them a conflation: Securing liberty. I am convinced that securing liberty was the reason they wrote the Constitution.

Which would you choose, to be free or to be secure? State security and personal freedom often run along tense lines with each other, but our Constitution and its philosophical roots clearly bias freedom over safety. In many ways, the first hundred years of American history represented a struggle between various presidential, congressional, and judicial precedents—both good and bad—to arrive at a philosophical and constitutional consistency for ensuring a nation in which individuals are free to acquire security; as freedom is a birthright and security is a good to be acquired. From the Revolution to the fall of the Federalists, to the Civil War and Reconstruction, America's commitment to personal freedom was tested in the exigencies of war. What are the philosophical roots of the freedom bias?

When our Founding Fathers drafted the Constitution they recognized that the proper role of government is a limited entity designed to protect individual natural liberties. Almost uniformly, Jefferson, Madison, Washington, even Hamilton, and their colleagues subscribed to the concept of the Natural Law and the inherent dignity of all persons¹: A dignity that bears with it the promise

¹ Chester James Antieau, *Natural Rights and the Founding Fathers – The Virginians*, 17 WASH. & LEE L. REV. 43, 43 (1960) (discussing the philosophy of natural rights).

of "certain unalienable Rights, among [which] are Life, Liberty, and the Pursuit of Happiness."²

This belief in inherent human rights permeated through the drafting of the Constitution. The influence of the Enlightenment philosophers John Locke and Thomas Hobbes upon the drafters anchored the document in Natural Law and personal liberty.³ In fact, the Drafters enshrined the protection of the rights inherently held by persons *a priori* to any social compact in the Constitution itself, as the Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."⁴ The Supreme Court, while eschewing the phrase "natural rights," has been more than willing to find indistinguishable 'unenumerated, fundamental rights.'⁵ The use of the word "retained" all but tips the Framers' hands as to their recognition of the source of rights as being individual humanity.

Underpinning this legal recognition of natural rights is an understanding of classical liberal philosophy. Classic liberal philosophy – today known as libertarianism – begins in the State of Nature. The Lockean State of Nature, or the natural state of mankind, is anarchy and exists in any territorial region without a legitimate government. There, every person has individual sovereignty, the absolute right to possess and control his person and rights.⁶

The core concept of Natural Law is the idea of self-ownership and personal liberty. However, "[t]he state of nature has a law of nature to govern it, which obliges every one: and reason, which is

² THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

³ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787* at 8, 14, 283-84, 289, 292, 348, 601-02 (1998) (discussing the roll of Hobbes and Locke in influencing the Founding Fathers and their philosophies).⁴ U.S. CONST. amend. IX.

⁴ U.S. CONST. amend. IX.

⁵ See generally *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

⁶ JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* at §§ 22-23 (1690).

that law, teaches all mankind, who will but consult it."⁷ Locke leaves his readers with an unsatisfactory anarchy, governed only by a discoverable-through-reason Natural Law and self-help as an enforcement mechanism.⁸ Like Hobbes before him, Locke recognized that life in the state of nature could be "solitary, poor, nasty, brutish, and short."⁹

In order to resolve this issue of perfectly equal rights with perfectly unequal protection, individuals yield some of *their* rights or liberty to a government via a social contract.¹⁰ Such a contract, like our Constitution, states expressly the role, powers, and limitations of the government, and is legitimized by the consent of the parties to the contract. This is liberty creating power, as Madison remarked.¹¹

Thus, leaving the State of Nature involves the creation of a limited, principled government. Under a minimalist conceptualization, a government exists solely to protect the people from 'aggression' – force or fraud – or at least to provide a forum for the people to protect themselves from force or fraud. Any other exercise of government power beyond defending against and adjudicating matters of force or fraud – beyond defending natural rights – is illegitimate aggression itself, and thus, an improper assault on natural rights.¹²

In the *Summa Theologica*, St. Thomas Aquinas wrote that the Natural Law exists above the laws of man, and that the validity of the laws of man depends on their compatibility with the Natural

⁷ *Id.* at § 6.

⁸ *Id.*

⁹ THOMAS HOBBS, *THE LEVIATHAN*, bk. 1, ch. XIII (1651).

¹⁰ LOCKE, *supra* note 6, at §§ 88, 127, 131.

¹¹ See JAMES MADISON AND THE FUTURE OF LIMITED GOVERNMENT 27 (John Curtis Samples, ed., Cato Institute, 2d prtg. 2003).

¹² See Murray Rothbard, *War, Peace, and the State*, *THE STANDARD* (April 1963), available at library.mises.org/books/Murray%20N%20Rothbard/War,%20Peace,%20and%20the%20State.pdf

Law.¹³ Accordingly, through Locke and Aquinas, there is a complete scheme of natural liberty. All persons are born with absolute and autonomous moral control over their bodies, over their property, and over their labor,¹⁴ tempered by their personal, limited surrender to the government of their individual rights, for example, *the right to enforce the Natural Law*.

That is to say, after leaving the State of Nature, people have an unlimited right to exercise all personal liberties that they have not delegated to the government.¹⁵ An abrogation of those rights not in accord with the Law of Nature lacks validity. In order to administer the Natural Law and to prevent force or fraud, a minimal state ought to be formed; and in order to control the state, a constitution, a supreme law of the land, needs to be adopted, enacted, and accepted by all over whom the state can govern; and it needs to be enforced against the state.

It is the central purpose of this work to explore the exercise of constitutional powers by the President of the United States of America during wartime, through the lens of the Natural Law and the U.S. Constitution, *viz.*, by addressing purportedly lawful presidential encroachment on an individual's enjoyment of self-ownership and natural liberty and constitutional guarantees.

No single action—by any branch of the federal government pursuant to any constitutional provision—has had the breadth and afforded deference as an action pursuant to the war power. War is a double-edged sword: it is a jingoist boon, and an individual rights bust.

"War is the health of the state," Randolph Bourne famously proclaimed in his 1918 essay.¹⁶ Ostensibly, this notion is counterin-

¹³ THOMAS AQUINAS, SUMMA THEOLOGICA, qq. 91, art. 4 (1265-1274).

¹⁴ See LOCKE, *supra* note 6, at §§ 4, 22.

¹⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *40.

¹⁶ RANDOLPH BOURNE, THE STATE *II (1918), available at <http://fair-use.org/randolph-bourne/the-state/>

tuitive: how can something which kills innocents as well as combatants, costs an astronomical sum, and has untold destructive potential be the health of the state? Allowing Bourne to answer for himself, he argues persuasively:

The moment war is declared, . . . the mass of the people . . . become convinced that they have willed and executed the deed themselves. They then, with the exception of a few malcontents, proceed to allow themselves to be regimented, coerced, deranged in all the environments of their lives, and turned into a solid manufactory of destruction toward whatever other people may have, in the appointed scheme of things, come within the range of the Government's disapprobation. The citizen throws off his contempt and indifference to Government, identifies himself with its purposes, revives all his military memories and symbols, and the State once more walks, an august presence, through the imaginations of men. Patriotism becomes the dominant feeling, and produces immediately that intense and hopeless confusion between the relations which the individual bears and should bear toward the society of which he is a part.¹⁷

Bourne's essay is not famous simply for that biting analysis of the psychology of war, but also for its specific discussion of individual liberty subsuming to state power. He has given one of the most comprehensive descriptions of war hysteria to date:

Minority opinion, which in times of peace, was only irritating and could not be dealt with by law unless it was conjoined with actual crime, becomes, with the outbreak of war, a case for outlawry. Criticism of the State, objections to war, lukewarm opinions concerning the necessity or the

¹⁷ *Id.* at *1.

beauty of conscription, are made subject to ferocious penalties, far exceeding in severity those affixed to actual pragmatic crimes.

.... A public opinion which, almost without protest, accepts as just, adequate, beautiful, deserved, and in fitting harmony with ideals of liberty and freedom of speech, a sentence of twenty years in prison for mere utterances, no matter what they may be, shows itself to be suffering from a kind of social derangement of values, a sort of social neurosis, that deserves analysis and comprehension.¹⁸

Not to belabor an obvious point, one I have previously made,¹⁹ but individual autonomy suffers *incomparably* during war: The rights to life and liberty are abrogated by the draft or internment camps; the right to free expression is limited whereby the mere distribution of literature the government hates or fears (and condemns as “subversive”) can lead to jailing;²⁰ the right to property and to contract is destroyed by rationing and industry boards designed to control and set prices, and by taxes;²¹ most recently, the right to private association and the natural right to privacy have been trounced by the dawning of government programs designed to snatch the identifying information, the geolocation data, and the content of almost every telephone call, and email.

This article explores the effect of fear or war hysteria in the development of national security law with respect to civil liberties by examining three specific rights. In Part I, it traces the development of the right to due process and the exceptions to its normal func-

¹⁸ *Id.*

¹⁹ See generally, e.g., ANDREW P. NAPOLITANO, THEODORE AND WOODROW: HOW TWO AMERICAN PRESIDENTS DESTROYED CONSTITUTIONAL FREEDOM (2012); ANDREW P. NAPOLITANO, LIES THE GOVERNMENT TOLD YOU: MYTH, POWER, AND DECEPTION IN AMERICAN HISTORY (2010).

²⁰ See generally *Abrams v. United States*, 250 U.S. 616 (1919).

²¹ See generally The Departmental Reorganization Act, 40 Stat. 556 (1918).

tioning for military commissions, from Lincoln's suspension of habeas corpus, to the military commissions and detention orders of World War II, to the Bush administration's Gitmo tribunals, to the kill orders of President Obama. Part II discusses the struggle for First Amendment rights and state secrecy during wartime, from the Alien and Sedition Acts of 1798, to the World War I period of extreme political suppression, to the second Red Scare, through the modern era. Part III presents the history and present status of the modern civil rights issue that national security law and war hysteria have given rise to: Privacy, from the beginning of domestic spying, to the Cold War, through the modern era. All three sections will be compared against the backdrop of the Founders' predilection for freedom over security, or, more strongly, freedom as security.

I. THE RIGHT TO DUE PROCESS

This section discusses the development of due process in times of war or in the name of national security. Specifically, it traces the institutionalization of military commissions in the American judicial system and habeas corpus rights. Lincoln's suspension of habeas and the trials of northern civilians by military commission, is the first major precedent that institutionalized commissions and habeas rights diminution, including Lincoln's actions during the war, and the Supreme Court cases of *Ex parte Merryman*,²² *Ex parte Vallandigham*,²³ and *Ex parte Milligan*.²⁴ The next major institutionalization came with FDR's Proclamation No. 2561, which caused a U.S. citizen who was captured by the FBI as a Nazi saboteur to be tried outside civilian courts. We will analyze that order and the Supreme Court case, *Ex parte Quirin*. Expounding on these precedents, in the modern War on Terror, President Bush issued Military Order No. 1,

²² 17 F. Cas. 144 (C.C.D. Md. 1861).

²³ 68 U.S. (1 Wall.) 243 (1864).

²⁴ 71 U.S. (4 Wall.) 2 (1866).

establishing a commission process for detainees in the War on Terror, regardless of the detainee's nationality. Bush's action touched off several acts of Congress and Supreme Court cases over the next several years. This practice has not abated during President Obama's administration, but expanded to include issuing kill orders, in secret, without judicial process, and with no regard for nationality.

A. THE CIVIL WAR: LINCOLN, MILITARY COMMISSIONS, AND HABEAS CORPUS

One of Lincoln's less savory legacies is his unilateral suspension of habeas corpus and creation of military justice courts. Contravening the Suspension Clause and ignoring the orders of the Chief Justice, Lincoln unilaterally removed the power to petition habeas corpus. While military commissions were not a novel idea in 1861, Lincoln's use of them during the Civil War created the first major precedent for institutionalizing their usage. The Supreme Court had the opportunity to address this in two cases, *Ex parte Vallandigham* and *Ex parte Milligan*.

1. *Ex parte Merryman and Lincoln's Usurpation of Congressional Prerogative*

There are some constitutional provisions that embody the quintessence of natural liberty itself. Habeas corpus, which draws its roots from ancient English common law, provides an efficient, fair, and natural safeguard of liberty. It enables a judge to assure the legitimacy of the government's forcible limitation on an incarcerated individual's freedom. Therefore, habeas corpus, essential to personal freedom, was expressly embodied in the Constitution, in the

Founding Father's effort to create a competent, yet controlled government.²⁵

The Framers invested considerable time debating the wording of the provision. James Madison is reported to have drafted one version, which resembles what would later be the First Amendment: "The legislature of the United States shall pass no law on the subject neither of religion, nor touching or abridging the liberty of the press; *nor shall the privilege of the writ of habeas corpus ever be suspended, except in case of rebellion or invasion.*"²⁶ The Framers opted for a far more limited provision, not expressly enumerating a right to the writ of Habeas Corpus—the drafters of the Constitution assumed that all persons already possess it by virtue of the Natural Law. Hence the Constitution provides that, "the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion, the public safety may require it."²⁷ Because the Clause is placed in Article I, the Suspension Clause unmistakably gives Congress alone the power to suspend the privilege of habeas corpus.

²⁵ ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 5 (Harvard University Press, 7th prtg. 1967).

²⁶ An Act for Better Securing the Liberty of the Subject, 1781, 21 & 22 Geo. 3, c. 11, § XVI (Ir.). 438 JAMES MADISON *THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 148 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1881) [hereinafter *ELLIOT'S DEBATES*]. This proposal's limitation of suspension to cases of rebellion or invasion would survive in the final draft. It may have derived from a number of sources, including possibly the Irish adoption of the 1679 Habeas Corpus Act ("An Act for Better Securing the Liberty of the Subject") in 1781, which imported the language of the 1679 Habeas Corpus Act verbatim, with one notable addition: a provision allowing the Irish Council to suspend the act "during such time only as there shall be an actual invasion or rebellion in this kingdom or Great Britain." See generally ANTHONY GREGORY, *THE POWER OF HABEAS CORPUS IN AMERICA: FROM THE KING'S PREROGATIVE TO THE WAR ON TERROR* (Cambridge Uni. Press, 2013).

²⁷ U.S. CONST. art. I § 9 cl. 2

During the Antebellum period, Congress never invoked its Suspension power.²⁸ Yet on May 28, 1861, the Clause came into the full focus of the Chief Justice of the Supreme Court, Roger Taney. Chief Justice Taney issued a writ of habeas corpus for John Merryman, commanding him to be delivered to the federal courthouse in Baltimore in order to determine the lawfulness of the government's detention of him.²⁹ Lincoln's response to the Chief Justice's writ of Habeas Corpus and what ensued afterwards has captivated historians and legal scholars for the last 150 years.³⁰

In 1861, after actual fighting initiated in the Civil War, pro-Confederate mobs ravaged the state roads, blockading the routes leading to the nation's capital. Fearing the loss of Maryland to the Confederacy, the President requested an official legal opinion from his Attorney General on suspending habeas corpus. The President issued a secret order to General Winfield Scott, then the commander of the Union Army, stating that if there was any resistance on 'military line,' from Annapolis to Washington, *the officer in command was authorized to suspend habeas corpus* in order to gain control of the road.³¹

John Merryman, a pro-confederate state militia lieutenant from Maryland, was accused of involvement in the incitement of riots, the cutting of telegraph wires, and the burning of several bridges. Merryman was arrested by a federal military official, charged, among lesser offenses, with treason and being a commissioned officer in an organization intending hostility towards the government,³² and detained indefinitely, without court appearance or any

²⁸ Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 903 (2012).

²⁹ BRIAN MCGINTY, *THE BODY OF JOHN MERRYMAN: ABRAHAM LINCOLN AND THE SUSPENSION OF HABEAS CORPUS 1* (Harvard Univ. Press, 2011).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 17.

semblance of process. Merryman's attorney sought a writ of habeas corpus from the federal court in Baltimore.

Chief Justice Taney, sitting as a circuit justice in Baltimore, ordered General Cadwalader to appear with John Merryman in the Baltimore federal courthouse within twenty-four hours. Sending a colonel in his stead, the General refused the Chief Justice's order, citing President Lincoln's Executive Order suspending Habeas Corpus. The Chief Justice replied declaring the actions of the President illegal.³³ A writ of attachment was issued for the General as well. The United States Marshal who went to enforce the order was refused entry to the Army base. Taney responded with a long and scathing opinion which he sent to major newspapers and to Lincoln himself.³⁴ The opinion soon garnered excited responses from all over the nation.³⁵ Lincoln rebuked the Chief Justice and refused to obey the order.³⁶

Merryman's case represents an egregious expansion of executive power. The judiciary entered into a fight with the executive, attempting to keep true to the Constitution. Lincoln viewed the suspension as a *military* decision made in his role as Commander-in-Chief, and thus immunized from judicial order.³⁷ From a constitutional perspective, President Lincoln could not be farther from correct. As the President, Lincoln had neither right nor authority to suspend the writ. As Commander-in-Chief, he has the power to command the Armed Forces of the United States, but that has no bearing on an enumerated congressional power. "The power to is-

³³ Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487) ("I can see no ground whatsoever for supposing that the President, in any emergency, or in any state of things, can authorize the suspension of the privileges [sic] of the writ of *habeas corpus*, or the arrest of a citizen, except in aid of the judicial power:").

³⁴ *Id.*

³⁵ MCGINTY, *supra* note 29, at 6.

³⁶ *Id.*

³⁷ *Id.* at 5.

sue the writ is given by law; it requires a law to change a law, and the President cannot make a law.”³⁸

In 1863, the Republican controlled Congress mustered enough votes to pass an official suspension of the writ.³⁹ Lincoln viewed this as validation; the ratification of two years of unconstitutional presidential conduct. The author of the suspension legislation, Senator Jacob Collamer (R-VT) noted that the suspension was necessary to confirm that the President can lawfully exercise the power to “secure” persons from “the commission” of acts “dangerous to the Government” in instances where they could not be charged criminally.”⁴⁰ Thankfully, there was some restraint on the part of Congress. Congress placed certain limitations, including the notification by cabinet officials of names to federal judges of individuals arrested during the suspension period and anyone under indictment for violating federal law who was entitled to bail before the suspension retained such entitlement.⁴¹

Violations of these sections subjected the offending federal officers to a fine or imprisonment or both.⁴² The restrictions indicate “Congress viewed suspension as a limited exception—justified by the dramatic nature of the times—to the requirement that the detention of persons within protection be effected through the ordinary criminal process.”⁴³ The term suspension connotes that this ability of Congress is a finite power. The Clause was never meant to provide federal officials a “blank check” for arbitrarily arresting and

³⁸ In re Kemp, 16 Wis. 359, 382 (1863).

³⁹ See An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases, 12 Stat. 755 (1863).

⁴⁰ Tyler, *supra* note 28, at 992 (citing the statement of Sen. Jacob Collamer, CONG. GLOBE, 39th Cong., 1st Sess. 2021 (1866) at 550).

⁴¹ See Act of Mar. 3, 1863, ch. 81, § I, 12 Stat. 755, 7552, 12 Stat. at 755–56. See also Tyler, *supra* note 28, at n. 578 (citing Act of Mar. 3, 1863, ch. 81, § I, 12 Stat. 755, 7552, 12 Stat. at 755–56.).

⁴² Tyler, *supra* note 28, at 987.

⁴³ *Id.* at 990.

detaining individuals. It was meant as a last resort to be used only in the direst of circumstances.

2. *Executive Detention and the Supreme Court's Response: Ex parte Vallandigham and Ex parte Milligan*

The concept of military tribunals and commissions is not a modern one. During the Civil War, tribunals were convened to adjudicate individuals who committed crimes in areas where martial law had been declared and where habeas corpus had been suspended.

In an affair that would become the Supreme Court case *Ex parte Vallandigham*, Congressman Clement Vallandigham of Ohio asserted that President Lincoln had waged war “for the purpose of crushing out liberty and erecting a despotism” and “restrain[ing] the people of their liberties.”⁴⁴ General Ambrose Burnside had recently issued General Order No. 38 to the citizens of Ohio, a tyrannical repression of free speech that made “declaring sympathies” with the enemy an offense against the military Department of Ohio, punishable by exile to the Confederacy.⁴⁵

General Burnside arrested Congressman Vallandigham on charges of “disloyal practice” and affording aid and comfort to the Rebels.”⁴⁶ Although reports have placed animosity between Lincoln and General Burnside,⁴⁷ the President defended his General’s actions, proffering that Vallandigham’s words were encouraging sol-

⁴⁴ Joseph A. Ranney, *Abraham Lincoln's Legacy to Wisconsin Law, Part 2: Inter-Arma Silent Leges: Wisconsin in Wartime* WISC. LAWYER (2009), available at <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=82&Issue=2&ArticleID=1670>

⁴⁵ General Ambrose Burnside, General Order No. 38 (1863).

⁴⁶ JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 176-79 (1926).

⁴⁷ See Ranney, *supra* note 44.

diers to desert the army.⁴⁸ The lower court judge, in denying Vallandigham a writ of habeas corpus, viewed the judicial branch as a “junior partner [in times of war], rather than a critical check on the executive.”⁴⁹

When the case reached the Supreme Court, the justices “finessed” the possibility of a ruling, but ultimately punted the case on jurisdictional grounds.⁵⁰ As a result of the Supreme Court’s reluctance to arrest Lincoln’s war machinery, Vallandigham, *a sitting United States Congressman from Ohio* was ultimately *shipped to the rebellious South* as punishment for his exercise of free speech.⁵¹

Contrarily, the Supreme Court in *Ex parte Milligan* held that the President had no authority to try civilians by military commission in areas where the civilian courts were still available to exercise their legitimate jurisdiction.⁵² Milligan was arrested along with four other men for plotting to steal Union army weapons and invading a Union prisoner of war camp in Indiana. The five men were subsequently tried by a military tribunal. The tribunal returned a guilty verdict, and the men were sentenced to death by hanging. Milligan appealed directly to the Supreme Court, requesting a writ of habeas corpus. Along with issuing the writ, the Supreme Court was careful to articulate that during a suspension of the writ of habeas corpus, the government may only detain individuals, not try them in a

⁴⁸ Letter to Erastus Corning (June 12, 1863), in LINCOLN: SPEECHES AND WRITINGS 1859-1865 at 460 (“Must I shoot a simpleminded soldier boy who deserts . . . while I must not touch a hair of a wily agitator who induced him to desert?”)

⁴⁹ GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 104 (2004).

⁵⁰ The Court curiously found that military commissions were not covered by the 1789 Judiciary Act that grants the Court’s habeas jurisdiction over inferior courts, nor were they a question of “law or equity within the meaning of [Article III of the Constitution].” *Ex parte Vallandigham*, 68 U.S. 243, 251 (1863).

⁵¹ THE TRIAL OF HON. CLEMENT L. VALLANDIGHAM BY A MILITARY COMMISSION: AND THE PROCEEDINGS UNDER HIS APPLICATION FOR A WRIT OF HABEAS CORPUS IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO 34 (Rickey & Carroll, 1863).

⁵² *Ex parte Milligan*, 71 U.S. (4 Wall.) at 142.

court established by the President when there are civilian courts still in operation.⁵³

Lincoln's administration rested its entire argument on the basis of a "[c]onstitutional necessity defense"⁵⁴: that in time of war, the need for national security outweighs and can trump civil liberties. Lincoln's attorney noted:

The officer executing martial law is at the same time supreme legislator, supreme judge, and supreme executive. As necessity makes his will the law, he only can define and declare it; and whether or not it is infringed, and of the extent of the infraction, he alone can judge. . . .⁵⁵

The extra-constitutional nature of these proclamations cannot be overstated. The Attorney General was essentially advocating for dictator-like control of the government. The Founders would have never approved of such a power grab, even in times of war. James Garfield, co-counsel for Milligan and future President, expounded, "When personal rights are merged in the will of the commander-in-chief, [what you have] is organized despotism... did not the 'first law of the Revolutionary Congress,' which was 'passed September 20th, 1776,' say that 'no officer or soldier should be kept in arrest more than eight days without being furnished with the written charges and specifications against' him?"⁵⁶

In a split decision, the *Milligan* Court sided with liberty rather than security, broadly providing that: "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men,

⁵³ See *id.*

⁵⁴ MAROUF A. HASIAN, IN THE NAME OF NECESSITY: MILITARY TRIBUNALS AND THE LOSS OF AMERICAN CIVIL LIBERTIES 80 (Univ. of Alabama Press) (2005).

⁵⁵ Ex parte Milligan, 71 U.S. (4 Wall.) at 14.

⁵⁶ HASIAN, *supra* note 54, at 104 (citing William H. Rehnquist, *Civil Liberty and the Civil War: The Indianapolis Treason Trials*, 72 IND. L.J. 933 (1997)).

at all times, and under all circumstances.”⁵⁷ It is important to note that five of the Justices held that even Congress itself did not wield the authority to circumvent the courts.

The case was decided after the Civil War had ended and Lincoln was dead, and the Court’s timing in issuing the ruling led many to believe that the case was irrelevant as it was now moot. Bryant Smith, reviewing a piece on *Milligan* for the *Texas Law Review* in 1930 is quoted as stating: “had [the case] come before the Court while the war was yet still in progress, the decision might very well have been the other way.”⁵⁸ Some 135 years after *Milligan*, the Bush and Obama administrations’ use of military commissions and the Supreme Court decisions that have followed are, for the most part, far more faithful to Justice Taney in *Merryman* and Justice Davis in *Milligan* than to Abraham Lincoln. The executive precedents Lincoln set, however, would be embraced fully and expanded radically upon by his successors.

B. WORLD WAR II:

1. *Military Tribunals and Ex parte Quirin*

The next major institutionalization of unilateral suspension of due process rights occurred in the administration of Franklin Delano Roosevelt. On July 2 1942, FDR issued Proclamation No. 2561, creating a military commission to try captured Nazi saboteurs despite the fact that one was a U.S. citizen and none was in uniform when arrested. The Supreme Court failed to address effectively the rights of these Nazis on appeal from denial of their habeas petitions in *Ex Parte Quirin*. Moreover, on February 19 1942, FDR issued Executive Order 9066 and permitted his military to issue numerous “exclusion” orders, interning the Japanese-American population in

⁵⁷ *Ex parte Milligan*, 71 U.S. (4 Wall.) at 120-21.

⁵⁸ Bryant Smith, *Ex Parte Milligan: In the Matter of Lambdin P. Milligan*, 9 TEX. L. REV. 122, 122 (1930).

camps on the West Coast. The subsequent Japanese-American cases on this forced detention have long since been lamented as a grievous miscarriage of justice.

Ex Parte Quirin begins with Operation Pastorius. In Germany in 1942, two groups of saboteurs who had lived in America were trained to enter the United States and sabotage its war effort.⁵⁹ The Long Island group landed in Amagansett Beach in Amagansett, New York a little after midnight on June 13th and the Florida group landed in Ponte Verda Beach, Florida on June 17th.⁶⁰ Each of the men wore a German military uniform.⁶¹ Both groups, being under-trained, underprepared, and (as will be shown) staffed with the wrong men for the job, would face embarrassing failure, thus discouraging sabotage attempts on the U.S. East Coast for the duration of the war.⁶²

George Dasch, leader of the New York group, while in his New York City hotel room, decided that he no longer wished to serve the Third Reich and turned himself in to the FBI.⁶³ After a manhunt, the remaining co-conspirators were arrested by June 27, 1942.⁶⁴

On July 2nd 1942, FDR issued Proclamation No. 2561, *retroactively* removing the right to a civilian trial, regardless of whether the defendants were American citizens:

⁵⁹ See *Ex parte Quirin*, 317 U.S. 1, 21-22 (1942) (per curiam); see also, Federal Bureau of Investigation, *George John Dasch and the Nazi Saboteurs*, FBI.GOV (visited March 18, 2014), <http://www.fbi.gov/about-us/history/famous-cases/nazi-saboteurs/george-john-dasch-and-the-nazi-saboteurs>.

⁶⁰ See *Ex parte Quirin*, 317 U.S. at 21-22.

⁶¹ *Id.*

⁶² Eike Frenzel, *Operation Pastorius: Hitler's Unfulfilled Dream of a New York in Flames*, DER SPIEGEL ONLINE INT'L (Sept. 16, 2010, 3:16 PM), <http://www.spiegel.de/international/zeitgeist/operation-pastorius-hitler-s-unfulfilled-dream-of-a-new-york-in-flames-a-716753.html>.

⁶³ Eike Frenzel, *supra* note 62; Federal Bureau of Investigation, *supra* note 59.

⁶⁴ Federal Bureau of Investigation, *supra* note 59.

[A]ll persons . . . who give obedience to or act under the direction of any . . . [Nation at war with the United States] and who during time of war enter or attempt to enter the United States or any territory or possession thereof . . . and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law or war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy . . . in the courts of the United States, or of its States, territories, and possessions⁶⁵

His order was published in the *Federal Register* on July 7, and the military tribunal opened proceedings against the saboteurs the next day, July 8.⁶⁶

The defense decided to engage in a collateral attack, filing a writ of habeas corpus in federal district court which challenged the lawfulness of the military proceedings. Their theory was that *Ex parte Milligan* was the controlling case, and that because civilian courts were open, access should be provided.⁶⁷ The district court denied leave in *Ex parte Quirin*, and the Supreme Court granted *certiorari*. The Supreme Court heard oral argument *the next day*, on July 29. The Court issued an unsigned, one-page *per curiam* order on July 31st affirming the commission's legitimacy.⁶⁸

While this collateral attack was ongoing, the tribunal convicted the saboteurs around August 1, and sentenced them to death. The

⁶⁵ Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942).

⁶⁶ See generally 1-18 STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS BEFORE THE MILITARY COMMISSION TO TRY PERSONS CHARGED WITH OFFENSES AGAINST THE LAW OF WAR AND THE ARTICLES OF WAR, WASHINGTON D.C., JULY 8 TO JULY 31, 1942 (Samaha et al. eds, 2004), available at http://www.soc.umn.edu/~samaha/nazi_saboteurs/indexnazi.htm. See also Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942).

⁶⁷ *Ex parte Quirin*, 47 F. Supp. 431 (D.D.C. 1942), *aff'd* 317 U.S. 1 (1942).

⁶⁸ *Ex parte Quirin*, 317 U.S. 1 (1942).

sentence was carried out on August 8 for six of them: George Dasch and Ernest Burger's sentences were commuted to long prison terms for their role in thwarting the plot.⁶⁹ The Supreme Court's "extended" opinion—providing the actual legal reasoning for the Court's decision—was filed months after the *per curiam* order and the executions.⁷⁰

There is a litany of constitutional problems with the *Quirin* case. The Nazi saboteurs were arrested, detained, and questioned by civilian authorities, mostly in the Southern and Eastern federal court districts of New York, which would have jurisdiction over their crimes. This right to a regular trial is contained not only in Article III, section 2 of the Constitution, but also in the Hague Conventions.⁷¹

And what of their citizenship? At the time the Supreme Court heard the case, Herbert Haupt, age 22, asserted that he was entitled to a civilian trial because he was arrested and detained by civilian authorities, on U.S. soil, *while a U.S. citizen*.⁷² The Supreme Court dismissed this argument in just two paragraphs, giving an opaque and circularly reasoned opinion on why his citizenship was not important.⁷³ Because he was not wearing his uniform he was in criminal violation of the laws of war; and because the law proscribing treason says nothing about failing to wear a uniform, no civilian protections were afforded him because he was charged with a violation of the law of war, not treason. Of course, waging war against the United States is the hallmark of treason, and the Constitution's criminalization of treason supersedes any treaty.⁷⁴

⁶⁹ See *supra* note 59.

⁷⁰ See *supra* note 68.

⁷¹ Hague Conventions of 1907, Ch. II, art. 30, Oct. 18, 1907, 20 U.S.T. 361.

⁷² Ex parte *Quirin*, 317 U.S. at 20-22.

⁷³ *Id.* at 37-38.

⁷⁴ Randal John Meyer, Note, *The Twin Perils of the al-Aulaqi Case: The Treason Clause and the Equal Protection Clause*, 79 BROOK. L. REV. 229, 262 (2013).

Most of all, the Court handily dismissed the *Ex parte Milligan* argument that the law of war “can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.”⁷⁵ How did the Court get around this clear rule regarding the primacy of civilian courts for citizens?

We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as-in circumstances found not there to be present and not involved here⁷⁶

The Court begs the question to be determined: The military tribunal in *Quirin* existed to determine whether the saboteurs were associated with the enemy. Therefore, unless the presumption of innocence is changed, the military tribunal would be unable to exercise jurisdiction without determining the verity of the indictment. The Court read *Milligan*, a jurisdictional case dealing with the predicate of which court's rule speaks in a certain area, and converted it into a choice of laws case, where the question is merely to what law the defendant is subject *within* the court structure. Additionally, the *Milligan* Court clearly stated that the question was jurisdictional: “The controlling question in the case is this: Upon the *facts* stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it *jurisdiction*, legally, to try and sentence him,”⁷⁷ not whether the laws of war applied to him.

⁷⁵ *Id.* at 45 (quotations and citations omitted) (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) at 2, 118, 121, 122, 131 (1866)).

⁷⁶ *Id.* (quotations and citations omitted).

⁷⁷ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, at 118.

The use of Commissions by FDR to avoid civilian process was not the only egregious unconstitutional unilateral exercise of military jurisdiction he took during that war. After the Attack on Pearl Harbor, FDR used his military and executive powers to force the Japanese-American population of the West Coast into “camps.”

2. *Executive Fiat: The Japanese Internment Camps*

War hysteria hits the hardest along racial lines. Following the attack on Pearl Harbor, the FBI detained over 9,000 aliens of German, Italian, and Japanese descent.⁷⁸ The approximately 890,000 remaining enemy aliens registered under the Smith Act were restricted from owning weapons, possessing radios, or freely moving.⁷⁹ The restrictions were lifted on Italian nationals.⁸⁰ German nationals were generally left to their own devices.⁸¹ The Japanese, however, were interned in camps for the duration of the war.

a. *Executive Order 9066*

“In the immediate aftermath of Pearl Harbor, there was no clamor for the mass internment of Japanese aliens and Japanese Americans”;⁸² however, FDR would sign Executive Order 9066 on February 19, 1942, just two-and-a-half months after the Pearl Harbor attack, permitting the internment of U.S. citizens without cause.

Misinformation amplified by racial tension and wartime hysteria caused public sentiment to shift away from condemning internment towards extolling its utmost necessity in just two months. On January 25, 1942, public sentiment shifted with the release of the report by the Commission on Pearl Harbor. The report placed

⁷⁸ STONE, *supra* note 49, at 286.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942); *see also* STONE, *supra* note 49, at 289.

blame for the Pearl Harbor incident on the shoulders of “persons of Japanese ancestry” for fifth column activities in Hawaii that enabled the attack.⁸³

“The public rationale for the decision, laid out in General DeWitt’s final report on the evacuation of the Japanese from the West Coast, was that . . . the government had no reasonable way to distinguish loyal from disloyal persons of Japanese descent,” so they should all be interned⁸⁴

Henry Stimson, the Secretary of War, designated DeWitt to carry out this act, pursuant to Executive Order 9066 on February 20, 1942.⁸⁵ Dewitt wasted no time in bringing the West Coast under his thumb. His Public Proclamation Nos. 1 and 2, issued March 2 and March 16, 1942, created military areas and warned of future possible evacuation for “classes of persons as the situation may require.”⁸⁶ There would be fifty-six more Exclusion Orders by May 10.⁸⁷ The imprisonment of 120,000 Japanese Americans would finish by August 7.⁸⁸

b. *Hirabayashi and Korematsu*

The Supreme Court reviewed the actions taken pursuant to Executive Orders 9066 and 9102 in two cases: *Hirabayashi v. United States* and *Korematsu v. United States*. What ensued was the greatest post-natal human rights debacle to date in Supreme Court history since the *Dred Scott* case: The detention of 120,000 West Coast Japanese-Americans, mostly citizens, despite not a single verified inci-

⁸³ STONE, *supra* note 49, 292.

⁸⁴ *Id.*

⁸⁵ *Hirabayashi v. United States*, 320 U.S. 81, 86 (1943).

⁸⁶ Public Proclamation No. 1, 7 Fed. Reg. 2320 (Mar. 2, 1942); Public Proclamation No. 2, 7 Fed. Reg. 2405 (Mar. 16, 1942); *Hirabayashi*, 320 U.S. at 86-87 (1943).

⁸⁷ *Hirabayashi*, 320 U.S. at 88.

⁸⁸ *Chronology of the Japanese American Internment*, CIVIL LIBERTIES PUB. EDUC. FUND., <http://www.momomedia.com/CLPEF/chrono.html>. (visited March 18, 2014).

dent of espionage or sabotage, based solely on their ancestry, was given the imprimatur, "constitutional."⁸⁹

Kiyoshi Hirabayashi, a native-born U.S. citizen, was convicted under a federal statute prohibiting disobeying the curfew proclamation.⁹⁰ Hirabayashi broke curfew by being outside of "the designated military area between the hours of 8:00 o'clock p.m. and 6:00 a.m."⁹¹ He asserted that his Fifth Amendment Due Process rights had been violated.

The Court first noted the tactical error of this legal argument. Rejecting *Lochner's* substantive due process, it held that "The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process."⁹² The curfew was found to be within the President's "war power," and the Court noted, "The fact alone that attack on our shores was threatened by Japan rather than another enemy power *set these citizens apart from others* who have no particular association with Japan."⁹³

The Court was wrong on two counts. First, due process encapsulates a semblance of equal protection: the process due to a Caucasian-American is the same process due to a Japanese-American. There is a natural right to equal protection under the laws, which is due any individual under judicial processing. Absent all governments' equal protection requirements, the laws would be so subjectively administered as to be authoritarian or meaningless. Further, the German-Americans were not rounded up, despite the beating that the Atlantic Coast was taking from the *Kriegsmarine*.

Korematsu v. United States was an appeal of an American citizen of Japanese descent who was convicted of "remaining in San

⁸⁹ STONE, *supra* note 49, at 287.

⁹⁰ Hirabayashi, 320 U.S. at 83.

⁹¹ *Id.* at 84.

⁹² *Id.* at 100.

⁹³ *Id.* at 101 (emphasis added).

Leandro, California," when a military order said he could not be there because of his race.⁹⁴ The opinion began by making a large advancement in civil liberties; it required strict scrutiny for racial classifications.⁹⁵ However, as the opinion turned, the government's action—the mass internment of over a hundred thousand Japanese-Americans without any individualized basis—was declared to be constitutional and Korematsu's conviction was upheld.⁹⁶ The Court opined:

Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.⁹⁷

Thus, in the face of difficult and trying times, actions that were not justifiable under necessity, but were manifestations of racism, hysteria, and the "herd" mentality lamented in the Bourne essay, were declared legal and constitutional. The counter-majoritarian branch, the Court, charged with halting the majority's encroachment on the civil and natural liberty of personal movement and use of property, failed miserably in its delegated task. The "constitutional" internment was "the worst blow our liberties have sustained in many years," and *Korematsu* a "disaster."⁹⁸

FDR's use of military jurisdiction and his Proclamation would set the precedent for George W. Bush's use of military powers in the Global War on Terror. The abusive use of military jurisdiction to

⁹⁴ *Korematsu v. United States*, 323 U.S. 214, 215-16 (1944).

⁹⁵ *Id.* at 216.

⁹⁶ *Id.* at 223-24.

⁹⁷ *Id.* at 220-21.

⁹⁸ Eugene V. Rostow, *The Japanese American Cases – A Disaster*, 54 YALE L. J. 489, 490 (1945).

effectuate executive will against detainees also would inspire Bush to create the legal twilight zone of Guantanamo Bay.

C. THE GEORGE W. BUSH ADMINISTRATION: THE REVIVAL OF
MILITARY COMMISSIONS AND DEMISE OF THE RIGHT TO TRIAL

FDR convened a military commission in 1942 and, within a month-and-a-half, executed all but two of the defendants brought before it; they were German saboteurs, including one U.S. citizen.⁹⁹ After the attacks of September 11, 2001, President Bush expanded upon this precedent and created a system of military commissions that would be an incredible example of the power the Bush administration believed the president had over human rights.

1. *Guantanamo Bay: The Pink Palace Court*

President Bush worked through military orders and the Department of Defense to carry out prosecutions, resulting in a battle with the Supreme Court and Congress over treatment and the civil liberties of detainees under U.S. jurisdiction that would last well into his successor's presidency. "The Bush Administration . . . acted as though 9/11 had forever changed the constitutional order, creating a permanent state of emergency where legislative and judicial powers must yield to executive policymaking decisions."¹⁰⁰ And in that permanent state, the American Star Chamber court, the Pink Palace court, was born.¹⁰¹

⁹⁹ See *supra* Part I.B.1 (discussing and criticizing *Quirin*).

¹⁰⁰ JESS BRAVIN, *THE TERROR COURTS: ROUGH JUSTICE AT GUANTANAMO BAY* 168 (Yale University Press 2013).

¹⁰¹ See *id.* at 181, 185, 203, 213, 219, 294, 333. The Pink Palace is the name of the Gitmo building wherein the trials were held. Bravin coins the term "Pink Palace Court" in his book *THE TERROR COURTS*, which is a reference to the Star Chamber Court, a similar Middle Ages English kangaroo court which handed down secret sentences in secret trials.

In the days following 9/11, the Bush administration's then-OLC head Robert Barr began floating the idea of military commissions in the style of FDR's Nazi saboteur trial.¹⁰² Vice President Cheney's legal counsel David S. Addington also reached a similar conclusion independently.¹⁰³ Deputy Assistant Attorney General Patrick F. Philbin authored a November 6, 2001 memo (relying on *Quirin*) which would claim: "The President both has inherent authority as Commander in Chief to convene military commissions and has received authorization from Congress for their use to the full extent permitted by *past executive practice*."¹⁰⁴ Philbin shrewdly used as his precedent not the familiar phrase "as permitted by law," but the Cheney-inspired "as permitted by past executive practice."

How did Philbin get around the *Milligan* rule that had been reinforced after *Quirin*? By ignoring contrary Supreme Court precedent and stating that "We believe that the broad pronouncements in *Milligan* do not accurately reflect the requirements of the Constitution and that the case has properly been severely limited by the later decision in *Quirin*."¹⁰⁵ So, the Executive Branch overrode the Supreme Court, despite Attorney General John Ashcroft's strenuous objections, both constitutional and practical.¹⁰⁶ This time, the prosecutions would not have the added legitimacy of at least being carried out by the attorney general, as Frank Biddle had done in the 1940s when FDR ordered the prosecution of the submarine saboteurs by military tribunal and not a federal court or regularly constituted court-martial.¹⁰⁷

¹⁰² *Id.* at 21-23.

¹⁰³ *Id.*

¹⁰⁴ Memorandum from Patrick F. Philbin, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Legality of the Use of Military Tribunals To Try Terrorists 25 Op. O.L.C. 1, 1 (Nov. 6, 2001), available at <http://www.fas.org/irp/agency/doj/olc/commissions.pdf>.

¹⁰⁵ *Id.* at 13.

¹⁰⁶ BRAVIN, *supra* note 100, at 41-42.

¹⁰⁷ Federal Bureau of Investigation, *supra* note 59.

At the same time, William (Jim) James Haynes II, General Counsel for the Department of Defense, began work on a military commission order.¹⁰⁸ When the order was circulated to the more independent (not political appointee) Judge Advocate Generals for the three military branches, they reacted with “disbelief,” one calling it “insane”:

[Haynes’] draft declared it “not practicable” for military commissions to follow “the principles of law and the rules of evidence” that defined American justice. Other than directing that trials be “full and fair,” the eighteen-hundred-word order made no reference to basic elements of due process—proof beyond a reasonable doubt, presumption of innocence, the right to remain silent. The only standard was that evidence hold “probative value to a reasonable person”—a unisex updating of the FDR order’s language, which referenced the “reasonable man.” Instead of separating the roles of judge and jury, the order merged them into a single finder of law and fact, a commission headed not by a judge but a “presiding officer” who could be overruled by the other members.

There was no requirement that any member of the commission be a lawyer. Instead lay officers from infantry, artillery, or other units would conduct a trial that could order a defendant executed.¹⁰⁹

In crafting his opinion, Haynes ignored the mountains of precedent from U.S. military commissions from the 1840 Mexican war; to the Civil War, where under general orders all commissions abided by “the same general rules as courts-martial in order to prevent

¹⁰⁸ BRAVIN, *supra* note 100, at 35-39.

¹⁰⁹ *Id.* at 39.

abuses which might otherwise occur"; to those in Europe after World War II that operated similar to "courts-martial and providing a review of each conviction."¹¹⁰

On November 13, Vice President Cheney saw President Bush at a luncheon and the latter orally approved the order, despite "little involvement" on Bush's part.¹¹¹ The order was not put through the typical vetting process executive proclamations go through, but was brought directly to Bush's office, where he simply "flip[ped] to the last page and sign[ed] it," without reading it, before dashing off to a meeting.¹¹²

Moreover, objectionable parts of the draft were not removed, classified evidence was ensured not to be shown to unauthorized defendants or defense attorneys, and appellate review was nowhere in sight.¹¹³ Accordingly, Bush created a kangaroo court under the ominously termed edict Military Order of November 13.¹¹⁴

2. *The Commissions Begin and then Bungle*

On March 21, 2002, Secretary of Defense Rumsfeld signed Military Commission Order No. 1 to effectuate Bush's order, which, after a hard fight within the Pentagon, included the *presumption of innocence* as a judicial guarantee.¹¹⁵ On February 7, 2002, Bush cleaned up any international law issues by denying that the Geneva

¹¹⁰ *Id.* at 38, 50-51.

¹¹¹ *Id.* at 43.

¹¹² *Id.* at 43-44.

¹¹³ See generally Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833-36 (Nov. 16, 2001).

¹¹⁴ *Id.*

¹¹⁵ U.S. Dep't of Defense, Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (March 21, 2002), available at <http://www.defense.gov/news/mar2002/d20020321ord.pdf>; see also *id.* § 5.B, at 6; BRAVIN, *supra* note 100, at 59-60.

Conventions applied to the current conflict.¹¹⁶ What ensued was a political struggle for the remainder of Bush's term over getting his own bureaucracy to try someone using these commissions (which would take years to do), and between Bush and the other branches over where the judicial power lay, despite the fact that the Constitution clearly gives it to the judiciary. The theories employed by the OLC in rendering its advice had long been "overwhelmingly rejected by the legal community."¹¹⁷

Haynes appointed Army Colonel Fred L. Borch to be the first Chief Prosecutor for the commissions to be carried out at Gitmo.¹¹⁸ He, in turn, appointed Lt. Col. Stuart Couch head of the Planning and Finances to the prosecutions team. The Administration chose Gitmo because it had a unique legal arrangement with the government of Cuba that avoided having literal American sovereignty attached to it, only "complete jurisdiction and control."¹¹⁹

Though clearly a bogus distinction, Deputy Assistant Attorney Generals John C. Yoo and Patrick F. Philbin believed it sufficient to avoid the "'interference" of "[j]udicial review" or the Geneva Conventions because it was the "'legal equivalent of outer space."¹²⁰ Thus, in January 2002, "Camp X-Ray" became active in Gitmo. Couch began raising concerns that evidence obtained during interrogation would be inadmissible.¹²¹ Evidence obtained under torture

¹¹⁶ Memorandum from George W. Bush, President, to Cabinet Members, Humane Treatment of Taliban and al Qaeda Detainees, para. 2.a, c-d, at 1-2 (Feb. 7, 2002), available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf. (denying Geneva Convention rights).

¹¹⁷ See BRAVIN, *supra* note 100, at 278.

¹¹⁸ *Id.* at 65.

¹¹⁹ Memorandum from Patrick F. Philbin & John C. Yoo, Deputy Assistant Att'y Gens., U.S. Dep't of Justice, Office of Legal Counsel, for William J. Haynes II, General Counsel, Dep't of Defense, Possible Habeas Jurisdiction Over Aliens Held in Guantanamo Bay, Cuba (Dec. 28, 2001), available at <http://www.torturingdemocracy.org/documents/20011228.pdf>.

¹²⁰ *Id.*; see also BRAVIN, *supra* note 100, at 75-76.

¹²¹ BRAVIN, *supra* note 100, at 93-94, 110-11, 156-61.

is subject to exclusion in court under both international law and Supreme Court precedent.¹²²

In March 2003, amidst bureaucratic issues from above, below, and other agencies, and ethical concerns from staff over using torture testimony and serious questions of constitutionality, Borch and the Commissions prosecutions office had a total breakdown in functionality¹²³. The executive branch couldn't even carry out its own unconstitutional orders. Moreover, in 2004, there were accusations that Borch was biased in his prosecutions and was not ensuring due process.¹²⁴ One prosecutor accused him of "'repeatedly'" saying, "'the military panel [jury] will be handpicked and will not acquit these detainees.'"¹²⁵ In April 2004, Col. Robert L. Swann would replace Borch as head of prosecutions.¹²⁶ He would clash with Couch over Couch's insistence on investigating detainee treatment and not trying cases where there was credible evidence of detainee abuse.¹²⁷

However, outside this system, civilian attorneys had been working to attack collaterally the Gitmo detainees' status through habeas petitions.¹²⁸ The Supreme Court was beginning to pay attention, and the executive unitary theory and an imperial president would soon be tested in the forum President Bush most feared.

¹²² See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 36/46, U.N. Doc. A/RES/39/46 (Dec. 10, 1984); *Rochin v. California*, 342 U.S. 165 (1952) (Frankfurter, J.).

¹²³ BRAVIN, *supra* note 100, at 116, 119-20, 134-39, 156-61.

¹²⁴ Assoc. Press, *Military Denies Rigging Guantanamo Trials*, WASH. POST (Aug. 2, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/01/AR2005080101488.html>

¹²⁵ BRAVIN, *supra* note 100, at 138.

¹²⁶ Jackie Northam, *Chief Guantanamo Prosecutor Departs*, NATIONAL PUBLIC RADIO (Apr. 22, 2004, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=1846734>

¹²⁷ BRAVIN, *supra* note 100, at 150-52.

¹²⁸ *Id.* at 167.

3. *The Supreme Court Battles Congress and the President*

a. *The Warning Volley: Padilla, Hamdi, and Rasul*

Between April 20 and 28, 2004, the Supreme Court heard oral argument in three cases: *Rumsfeld v. Padilla*, *Hamdi v. Rumsfeld*, and *Rasul v. Bush*. After the close of arguments on the 28th, when the U.S. government's lawyers vehemently denied torturing detainees, the Abu Grahیب scandal broke on TV.¹²⁹ On June 28, the Court handed down its opinions in all three cases, giving a clear warning shot to the executive branch that the judiciary would be stepping in. President Bush was dismissive of the cases and minimized their importance in public.¹³⁰

José Padilla is a native-born U.S. citizen.¹³¹ As he stepped off his flight from Pakistan to Chicago O'Hare, federal agents apprehended him under a material witness warrant, permitting them to detain him as a material witness in an ongoing proceeding.¹³² The stated ongoing proceeding was the grand jury investigation in the Southern District of New York into the 9/11 attacks.¹³³ Padilla was transferred to Justice Department criminal custody in New York City.¹³⁴ He moved to vacate the warrant against him on May 22, but his petition would have to wait.¹³⁵

On June 9, President Bush issued an order designating Padilla—a citizen detained peacefully on U.S. soil and being processed in open, working courts who had never been accused of engaging

¹²⁹ *Id.* at 167-69; JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 260 (Anchor Books, 1st ed. 2009).

¹³⁰ See BRAVIN, *supra* note 100, at 170-71.

¹³¹ *Rumsfeld v. Padilla*, 542 U.S. 426, 430 (2004) (Rehnquist, C.J.).

¹³² *Id.* at 430-31.

¹³³ *Id.* at 426, 430-31.

¹³⁴ *Padilla*, 542 U.S. at 431; *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564, 571 (S.D.N.Y. 2002), *aff'd sub. nom. Padilla ex rel. Newman v. Rumsfeld*, 243 F. Supp. 2d 42 (S.D.N.Y. 2003).

¹³⁵ See *Padilla*, 542 U.S. at 431.

in acts of violence—an enemy combatant, and directing Rumsfeld to seize Padilla from the custody of U.S. marshals in Manhattan, and detain him in military custody under the Department of Defense.¹³⁶ The president claimed his inherent war powers and the Authorization for Use of Military Force (AUMF) permitted him to do so.¹³⁷ Padilla was moved to a South Carolina brig, where he would be held for three-and-a-half-years with no access to family or an attorney from June 2002 to March 2004.¹³⁸

Padilla's lawyer, filing as a third party, sought a writ of habeas corpus from Judge Michael Mukasey, a future Bush Attorney General, and then the Chief Judge of the Southern District of New York, the place from which Padilla had been unlawfully kidnapped by the military. Judge Mukasey ruled that the Southern District of New York had jurisdiction to issue the writ, but that the President had the authority to detain Padilla.¹³⁹ The Second Circuit affirmed on the jurisdictional question, but reversed on the question of presidential authority.¹⁴⁰ The Supreme Court granted *certiorari*.

However, Padilla was effectively denied relief. Chief Justice William Rehnquist, writing for the majority, held that the Southern District of New York did not have jurisdiction to hear the case. The Court held that the proper respondent was not the Defense Secretary, but the brig commander, and thus jurisdiction is proper within District of South Carolina.¹⁴¹ Accordingly, the court did not reach the question of whether the President had the "authority to detain Padilla militarily."¹⁴²

Rasul v. Bush was the next terrorism case reported that day. The plaintiffs were two "Australian citizens and 12 Kuwaiti citizens

¹³⁶ *Id.* at 431-32.

¹³⁷ *Id.* at 431.

¹³⁸ *Id.* at 432; *Padilla v. Yoo*, 678 F.3d 748, 751 (9th Cir. 2012).

¹³⁹ *Padilla*, 542 U.S. at 426 (citations omitted).

¹⁴⁰ *Id.* at 426 (citations omitted).

¹⁴¹ *Id.* at 442, 428.

¹⁴² *Id.* at 430, 433-34.

who were captured abroad during hostilities between the United States and the Taliban,” now housed in Gitmo.¹⁴³ The detainees filed for writs of habeas corpus in the district court for the District of Columbia, which held that aliens detained outside U.S. sovereign territory may not petition for a writ of habeas corpus. The D.C. Court of Appeals affirmed.¹⁴⁴ The Supreme Court reversed:

But in any event, *nothing* in . . . *any of our other cases* categorically excludes aliens detained in military custody outside the United States from the “‘privilege of litigation’” in U.S. courts. The courts of the United States have traditionally been open to nonresident aliens. *Cf. Disconto Gesellschaft v. Umbreit*, 208 U.S. 570, 578, . . . (1908) (“Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the protection of their rights”). And indeed, 28 U.S.C. § 1350 explicitly confers the privilege of suing for an actionable “tort . . . committed in violation of the law of nations or a treaty of the United States” on aliens alone.¹⁴⁵

Thus, the court dismissed the Bush administration’s arguments that militarily detained aliens may be categorically denied access to court. And what of the President’s extension of military jurisdiction under the war power? Would that preclude review? No, “[t]he fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court’s jurisdiction over their . . . claims.”¹⁴⁶ Chief Justice Rehnquist, and Justices Scalia and Thomas dissented, calling the majority opinion “an irresponsible overturning of settled law in a matter of extreme importance to our

¹⁴³ *Rasul v. Bush*, 542 U.S. 466, 470 (2004).

¹⁴⁴ *Id.* at 471-72 (quoting *Rasul v. Bush*, 215 F. Supp. 2d 55, 68 (D.D.C. 2002)).

¹⁴⁵ *Id.* at 484-85 (citations omitted).

¹⁴⁶ *Id.* at 485.

forces currently in the field” that Congress ought to resolve.¹⁴⁷ The majority, however, had supplied the Constitution a victory: the writs may issue and detainees may access civilian courts.

The court’s last detainee case that day was *Hamdi*. However, the court’s makeup would again realign with Justices Stevens and Scalia joining in dissent, while Justice O’Conner took the plurality. What was the complicating factor? The appellant was a U.S. citizen—the exact question the Court avoided in *Padilla*. Yaser Easm Hamdi was born in Louisiana, moved to Saudi Arabia as a child, then ended up in Afghanistan for about two months in 2001.¹⁴⁸ Northern Alliance fighters captured Hamdi in Afghanistan and turned him over to U.S. officials as an enemy combatant. The government interrogated him in Afghanistan, transferred him to Gitmo in January 2002, then upon discovering he was a citizen, moved him in April 2002 to the same South Carolina brig that held Padilla. His father sought a writ of habeas corpus in the Eastern District of Virginia.¹⁴⁹ The district court granted standing to the father and ordered that Hamdi be given access to counsel.¹⁵⁰ The Fourth Circuit reversed.

Writing for the plurality, Justice O’Connor avoided the question of whether the Constitution gave the President plenary power to detain individuals, narrowly addressing if “the Executive has the authority to detain citizens who qualify as ‘enemy combatants.’”¹⁵¹ O’Connor balanced Hamdi’s right to be free from detention without Congressional authorization against the government’s war authority.¹⁵²

¹⁴⁷ See *id.* at 489-90 (Scalia, J., dissenting).

¹⁴⁸ *Hamdi v. Rumsfeld*, 542 U.S. 507, 510-11 (2004) (O’Connor, J., plurality opinion).

¹⁴⁹ *Id.* at 510.

¹⁵⁰ *Id.* at 511.

¹⁵¹ *Id.* at 516-17.

¹⁵² *Id.* at 528-35.

Taking a unique view of the Suspension Clause, O'Connor concluded that the AUMF was an act of Congress that permitted detention and thus, while not expressly saying it, somehow did not offend the Suspension Clause of the Constitution.¹⁵³ The plurality opinion held that due process requires that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," not a trial or a habeas hearing, and possibly a McCarran Act tribunal.¹⁵⁴

Justice O'Connor also left open the door for the McCarran Act to be reintroduced into American national security law almost forty years after the Nixon Era put it to rest. The Fourth Circuit had held that the president had the authority to detain Hamdi pursuant to an act of Congress,¹⁵⁵ which means that the Non-Detention Act of 1971 does not prevent McCarran Act detentions. Justice O'Connor attempted to hedge her language as much as possible in implicitly reviving the McCarran Act: "[T]he AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe (assuming, without deciding, that such authorization is required), and that the AUMF satisfied [the Non-Detention Act's] requirement that a detention be "pursuant to an Act of Congress" (assuming, without deciding, that [the Non-Detention Act] applies to military detentions)."¹⁵⁶

O'Connor's "narrow category" is also quite unclear. In the following sentences she references both the broadest language of the AUMF—which the reader has seen can be stretched to almost no

¹⁵³ *Id.* at 525-28.

¹⁵⁴ *Id.* at 507, 533. During the Korean War, Congress passed the McCarran Internal Security Act of 1950, which gave the president broad authority to incarcerate Americans and foreigners at the discretion of the president after a *presidentially declared* emergency.

¹⁵⁵ *Id.* at 517.

¹⁵⁶ *Id.* at 517.

limit—and narrowly to Afghani Taliban fighters.¹⁵⁷ The language of the case leans towards the latter, but hopefully it will not be read as the former. She also refused to narrow the category by distinguishing between citizens and non-citizens, on U.S. soil or abroad.¹⁵⁸

Justices Scalia and Stevens' dissent takes the proper view of the case:

Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause. Accordingly, I would reverse the judgment below.¹⁵⁹

The Suspension Clause is a binary power, as Justice Scalia properly recognizes, not a balancing interest. Congress did not suspend the writ in the AUMF—indeed, if one looks to the only example of Congress suspending the writ (in 1863), the lawmakers took the care to be so express as to title the Act “An act relating to Habeas Corpus, and regulating Judicial proceeding in Certain Cases.”¹⁶⁰ Clearly, congressional precedent and the plain text of the AUMF

¹⁵⁷ See *id.* at 518.

¹⁵⁸ See *id.* at 519.

¹⁵⁹ *Id.* at 554 (Scalia, J., dissenting).

¹⁶⁰ Ch. 81, 12 Stat. 755-58 (1863).

lend more credibility to Justices Scalia and Stevens than to Justice O'Connor's plurality.

Overall, June 28, 2004 was a good day for liberty compared to the executive/military tyranny that preceded it. But, the Court gave the President some wiggle room to save face: Bush himself could establish military tribunals but they must afford traditional due process rights, thus legitimizing them as a respecter of civil liberties and national security.

In order to appear to satisfy the Supreme Court's ruling, Deputy Defense Secretary Paul Wolfowitz signed an order on June 7, 2004, creating Combatant Status Review Tribunals (CSRT), which he contended afforded the detainees confrontation rights, and limited rights to see the evidence being put against them.¹⁶¹ However, "[t]he Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems *relevant and helpful* to a resolution of the issue before it."¹⁶² Relevant and helpful is a low bar compared to balancing prejudice and probative value for each piece of evidence, the due process a civilized people would expect.

b. *The Hamdan Case Begins*

On August 4, 2004, the Pink Palace court would open arraignments for the first four cases. This was, of course, almost three years after these accused were first detained, during all of which time the federal courts were open and operating—so much for the right to a speedy trial.¹⁶³ The first of these new prosecutions would be against

¹⁶¹ Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, U.S. Dep't of Defense, for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunals (July 7, 2004), available at <http://www.defense.gov/news/Jul2004/d20040707review.pdf>.

¹⁶² *Id.* at 3 (emphasis added).

¹⁶³ See BRAVIN, *supra* note 99, at 185.

Salim Hamdan.¹⁶⁴ However, while the attorneys were quibbling over issues regarding the composition of the judicial panel, the D.C. district court issued an order to the government to justify his confinement.¹⁶⁵ The commissions were halted. However, on July 15, 2005, the D.C. Circuit Court of Appeals reversed the district court and the commissions resumed.¹⁶⁶ On November 7, 2005, the Supreme Court granted certiorari to Hamdan,¹⁶⁷ posturing for a direct square off with the President over the constitutionality of his commissions.

c. *Congress Steps In Between the Court and the President*

On December 30, 2005, however, Congress stepped in—during the pendency of Supreme Court proceedings—and enacted legislation that aimed to prevent the Supreme Court from hearing Hamdan’s appeal.¹⁶⁸ The Detainee Treatment Act, discussed, *supra*, also contained a second provision in it that incentivized Bush to sign it: A jurisdictional limitation. Pursuant to Article III of the Constitution, except where the Supreme Court is given original jurisdiction, Congress decides where the jurisdiction of federal courts begins and ends.¹⁶⁹ The act was intended to prevent “the Bush Administration from abusing prisoners [but it] became, in final form, a license for further excess.”¹⁷⁰

Besides dealing with treatment as such, the Act did two things with respect to jurisdiction. First, except as provided for within the Act, “no court, justice, or judge, shall have jurisdiction to hear or consider” writs of habeas corpus or “any other action against the

¹⁶⁴ *Id.* at 185-90.

¹⁶⁵ See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 173 (D.D.C. 2004) (Robertson, J.); see also BRAVIN, *supra* note 99, at 219-20.

¹⁶⁶ *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557 (2006).

¹⁶⁷ *Hamdan v. Rumsfeld*, 546 U.S. 1002 (2005).

¹⁶⁸ BRAVIN, *supra* note 100, at 276-77.

¹⁶⁹ U.S. CONST. art. III.

¹⁷⁰ BRAVIN, *supra* note 100, at 276.

United States and its agents relating to any aspect of . . . detention” for persons properly designated enemy combatants and in military custody.¹⁷¹ Second, the Act gave “exclusive jurisdiction” to hear appeals from commissions or CSRTs to the D.C. Court of Appeals—the same court that had overturned Hamdan’s habeas petition in the first place.¹⁷²

d. *Justice Stevens Strikes Back: Hamdan v. Rumsfeld*

Oral arguments took place on March 28, 2006.¹⁷³ Salim Hamdan was bin Laden’s driver.¹⁷⁴ Because Chief Justice Roberts when he was Judge Roberts had been on the Circuit Court panel that denied Hamdan’s petition, he disqualified himself. With one of the three dissenters in *Rasul* out of play, things were looking up for Hamdan. However, there was still the question of whether the Court even retained the power to hear the case in light of the Act.

Justice Stevens announced the majority opinion on June 28, 2006.¹⁷⁵ The Court found that the Detainee Treatment Act of 2005 did not strip its jurisdiction in *this* case, that the AUMF and Detainee Treatment Act do not authorize military commissions, and that the commissions’ procedures violated both the domestic Uniform Code of Military Justice as well as the Geneva Conventions, Common Article 3 of which applied to the current conflict with al-Qaeda.¹⁷⁶

¹⁷¹ Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739-44, 2742, div. A, tit. X, § 1005(e)(1) (2005).

¹⁷² *Id.* at div. A, tit. X, § 1005(e)(2), (3).

¹⁷³ Hamdan v. Rumsfeld, 548 U.S. 557, 557 (2006).

¹⁷⁴ Assoc. Press, *Bin Laden’s Driver Outmaneuvers Guantanamo Trials*, SYDNEY MORNING HERALD (Nov. 9, 2004, 11:08 AM), <http://www.smh.com.au/news/Global-Terrorism/Osamas-driver-outmanoeuvres-terror-trials/2004/11/09/1099781361307.html>.

¹⁷⁵ Hamdan, 548 U.S. at 557.

¹⁷⁶ See *id.* at 557.

In dealing with the Detainee Treatment Act, the Court handily dismissed the jurisdictional issue. While the act does strip jurisdiction, it does not do so for pending cases filed prior to the date of the Act's enactment: "[I]f a statutory provision 'would operate retroactively' as applied to cases pending at the time the provision was enacted, then 'our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.'"¹⁷⁷ As there was no clear congressional intent to make the Act retroactive, jurisdiction was not revoked over pending claims.¹⁷⁸

With respect to the merits, the Court was less forgiving. Justice Stevens began by noting that the Military Commissions Order No. 1 signed by Rumsfeld "permit[s] the admission of *any* evidence," sworn, unsworn, hearsay, and coercion-induced were all admissible and that the defendants had limited rights to see the evidence against them.¹⁷⁹ Further, he noted that based on the Uniform Code of Military Justice, "the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable."¹⁸⁰ He then gave deference to the president's determination that civilian court rules were not practicable here, but stated that there was no similar determination for courts-martial rules, and thus, Hamdan's treatment was unconstitutional under domestic law.¹⁸¹

Additionally, the majority applied the Geneva Conventions' Common Article 3 to all detainees:

Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which

¹⁷⁷ *Id.* at 560.

¹⁷⁸ *Id.* at 581-84.

¹⁷⁹ *Id.* at 613-17.

¹⁸⁰ *Id.* at 620.

¹⁸¹ *Id.* at 623-24.

are recognized as indispensable by civilized peoples." While the term "regularly constituted court" is not specifically defined in either Common Article 3 or its accompanying commentary, other sources disclose its core meaning. The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines "'regularly constituted'" tribunals to include "ordinary military courts" and "definitely exclud[e] all special tribunals."¹⁸²

Bush's powers to defy the Constitution and laws of war seemed to be at an end. As Jess Bravin eloquently puts it: "[Bush] had created a permanent offshore system of summary justice by extrapolating his constitutional functions 'commander and chief of the Army and Navy' into the power to do whatever he wished in the name of national security. The Constitution contemplated no such thing, the Court said"¹⁸³

However, Bravin also noted that the Court's opinion merely meant that Bush needed to "seek congressional authorization before deviating from existing military statute."¹⁸⁴ In fact, "Because the military order violated acts of Congress [the Uniform Code of Military Justice], Stevens found no need to go further"¹⁸⁵ Thus, expecting the executive to take the second warning volley as an opportunity to fix its own house, Stevens did not reach "whether the commissions Bush envisioned would be constitutional even with congressional authorization."¹⁸⁶ "Vice President Cheney now demanded that legislation authorizing commissions be passed immediately."¹⁸⁷

¹⁸² *Id.* at 631-32.

¹⁸³ BRAVIN, *supra* note 100, at 306.

¹⁸⁴ *Id.* at 306-307; *see id.* at 308.

¹⁸⁵ *Id.* at 308.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 310.

e. *Congress Responds: The Military Commissions Act of 2006*

Congress and the Supreme Court were due to go another round in Bush's presidency over the issue of commissions, which would continue well into his successor's second term. On October 17, 2006, a few months after *Hamdan* was handed down, Congress passed the Military Commissions Act of 2006, attempting to overrule *Hamdan*.¹⁸⁸

The act made some improvements on the military commissions, like excluding some torture statements, but overall was an endorsement of Bush policies. First, as far as torture statements, if the "degree of coercion" is disputed, the evidence could be admitted based on its probative value.¹⁸⁹ Moreover, hearsay evidence was admissible unless "unreliable or lacking in probative value."¹⁹⁰ That means the panel, which is also performing the role of fact-finder traditionally assigned to juries, would need to assess the reliability of witnesses and the probative value of evidence before contemplating a verdict. Moreover, it stripped habeas jurisdiction from all courts for all claims retroactively and in the future, except for the D.C. Court of Appeals per the 2005 Act, via altering the habeas corpus jurisdiction statute.¹⁹¹ Notably, Senator Barack Obama (D-IL) voted against the act.¹⁹²

f. *Boumediene v. Bush*

Lakhdar Boumediene was another Gitmo detainee whose family had filed third-party petitions for writs of habeas corpus. The D.C. Circuit Court of Appeals denied his habeas petition.¹⁹³ On April 2, 2007, the Supreme Court denied certiorari, citing a desire to

¹⁸⁸ Military Commissions Act of 2006, Pub. L. 109-366, 120 Stat. 2600.

¹⁸⁹ *Id.* at 2607.

¹⁹⁰ *Id.* at 2609.

¹⁹¹ *Id.* at 2635-36.

¹⁹² BRAVIN, *supra* note 100, at 312.

¹⁹³ *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007).

avoid creating new constitutional law.¹⁹⁴ However, on June 29, 2007, the Court reversed itself and granted certiorari.¹⁹⁵ The Court was again squared off with President Bush and Congress in the 2008 case of *Boumediene v. Bush*. This time, however, the Court would not stop short.

Justice Kennedy, writing for the majority, began by distinguishing its analysis in the previous four cases: "Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the *constitutional* privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause."¹⁹⁶ The previous cases, dealt with the *statutory right* of habeas corpus, which Congress may amend, but not the *constitutional right* to the writ.

He proceeded to address the relationship between *Hamdan* and the Military Commissions Act:

[W]e cannot ignore that the MCA was a direct response to *Hamdan's* holding that the DTA's jurisdiction-stripping provision had no application to pending cases. The Court of Appeals was correct to take note of the legislative history when construing the statute, and we agree with its conclusion that the MCA deprives the federal courts of jurisdiction to entertain the habeas corpus actions now before us.¹⁹⁷

It seemed like a loss for liberty: The Court had no jurisdiction to hear the claim. However, while habeas jurisdiction is statutory, it is a constitutional right that cannot be abridged simply by saying no court may hear it. Thus, Congress must take the extraordinary step of suspending habeas corpus under the terms set forth in the Sus-

¹⁹⁴ *Boumediene v. Bush*, 549 U.S. 1328, *vacated*, 551 U.S. 1160 (2007).

¹⁹⁵ *Boumediene v. Bush*, 551 U.S. 1160 (2007).

¹⁹⁶ *Boumediene v. Bush*, 553 U.S. 723, 723 (2008).

¹⁹⁷ *Id.* at 738-39 (citations omitted).

pension Clause, lest the constitutional language be rendered meaningless.

The jurisdictional issue was not that simple, however. While the Court arguably lacked *subject-matter* jurisdiction because of the Commissions Act, it also had an issue of *personal* jurisdiction: As John Yoo pointed out, Cuba is not sovereign U.S. territory and the U.S. Supreme Court's jurisdiction over persons ends at the limits of U.S. sovereignty. The Supreme Court had to establish both personal and subject-matter jurisdiction.

Kennedy dismissed Yoo's argument by distinguishing between *de jure* (by law) and *de facto* (by the facts) sovereignty. By law, yes Cuba was sovereign, but:

There is no indication . . . that adjudicating a habeas corpus petition would cause friction with the host government. No Cuban court has jurisdiction over American military personnel at Guantanamo or the enemy combatants detained there. While obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base.¹⁹⁸

The Court then held that because the Court and the Constitution's jurisdiction extended to the *de facto* U.S.-sovereign territory of Cuba, "[the Suspension Clause] of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause."¹⁹⁹ The court then read the Military Commissions Act as a jurisdiction-stripping statute, not a suspension; therefore, "MCA § 7 thus effects an unconstitutional suspension of the writ."²⁰⁰

¹⁹⁸ *Id.* at 770.

¹⁹⁹ *Id.* at 771.

²⁰⁰ *Id.* at 792.

The Court's holding restored accountability and preserved the legitimacy of U.S. courts. Those "officials whose primary motive was redistributing powers from the legislative and judicial branches to the executive," had lost their day in court.²⁰¹ Unfortunately, however, this battle would extend well into the next presidency.

D. PRESIDENT OBAMA CONTINUES BUSH'S WORST POLICIES

1. *The Military Commissions Stand*

President Obama voted against the Military Commissions Act of 2006 when he was a senator and while campaigning pledged that: "As president, I will close Guantanamo, reject the Military Commissions Act, and adhere to the Geneva Conventions."²⁰² And in 2008, it seemed as though he had the political impetus to do so: The international community hated Gitmo, the people of the United States were against Gitmo, and the Supreme Court had declared in *Boumediene* that the latest attempt to isolate Gitmo from judicial review was unconstitutional.

By the time Obama entered office, all but one detainee had been held for almost seven years without trial. Obama, however, would prove similar to his predecessor: "He was reluctant to surrender the executive powers his predecessor had claimed," giving Gitmo and the Pink Palace court "a bipartisan imprimatur that virtually ensures they will be a fixture of American law for years to come."²⁰³

Initially, the Obama Administration showed some signs of a commitment to the Constitution and a willingness to wind down the Bush legal regime. In his second day in office, President Obama issued three executive orders. Executive Order 13491 set the Geneva

²⁰¹ BRAVIN, *supra* note 100, at 380.

²⁰² Barack Obama, Sen., Speech at the Woodrow Wilson International Center (Aug. 11, 2007), available at <http://www.cfr.org/elections/obamas-speech-woodrow-wilson-center/p13974>.

²⁰³ BRAVIN, *supra* note 100, at 355, 381.

Convention's Common Article 3 as the "minimum baseline" for detainee treatment and compelled all interrogations to follow the Army Field Manual, rather than the system set out in Yoo's OLC torture memos.²⁰⁴ Executive Order 13942 ordered a review of Gitmo detainees to ascertain their statuses (due for transfer, for prosecution, etc.).²⁰⁵ Executive Order 13943 created a task force to develop policies on disposing of the Gitmo cases.²⁰⁶ He also "suspended commissions proceedings indefinitely."²⁰⁷ Administration officials saw this as a good opportunity to make a "clean break with Bush's legal experiments."²⁰⁸ However, it went downhill from there.

By May 2009, Obama had reversed his position: "following months of pressure from Defense Department and National Security officials, according to three knowledgeable sources, Obama changed course and announced that his administration would resurrect the Bush-era military commissions he had vowed to oppose."²⁰⁹ In his May 15, 2009 press release, Obama's position was significantly different than the vitriolic distaste for military commissions he had previously espoused:

Military commissions have a long tradition in the United States. They are appropriate for trying enemies who violate the laws of war, provided that they are properly structured and administered. In the past, I have supported the use of military commissions as one avenue to try detainees, in addition to prosecution in Article III courts. In 2006, I voted in favor of the use of military commissions. But I objected

²⁰⁴ See Exec. Order No. 13491, 74 Fed. Reg. 4893, 4894 (Jan. 22, 2009).

²⁰⁵ See Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

²⁰⁶ See Exec. Order No. 13493, 74 Fed. Reg. 4901 (Jan. 22, 2009).

²⁰⁷ BRAVIN, *supra* note 100, at 355.

²⁰⁸ *Id.*

²⁰⁹ Jason Leopold, *A Campaign Promise Dies: Obama and Military Commissions*, TRUTH-OUT (Apr. 4, 2011, 10:24 AM), <http://www.truth-out.org/news/item/285:a-campaign-promise-dies-obama-and-military-commissions>.

strongly to the Military Commissions Act that was drafted by the Bush Administration and passed by Congress”²¹⁰

On November 13, 2009, however, Attorney General Eric Holder announced at last that Khalid Shaikh Mohammed would be tried with half of the other 9/11 conspirators in federal district court in New York City.²¹¹

Obama, having now flipped on the issue, set the stage for Congress to force his hand. On October 28, 2009, Congress passed the Military Commissions Act of 2009, which Obama signed into law the same day. The Act limited hearsay and coercion testimony and improved the ability of the defense to obtain witnesses and present its case.²¹² It also included prohibitions on double jeopardy.²¹³ However, it still fell “far short of the requirements imposed by the Constitution and Geneva Conventions.”²¹⁴ It did not bar all coercion testimony, and generally “retained many of the structural flaws that had hobbled [commissions] since 2001.”²¹⁵

The National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA) was another nail in the coffin of constitutional norms. The 2012 NDAA included three provisions which render the commissions system permanent. First, is Section 1021, which states:

²¹⁰ *Statement of President Barack Obama on Military Commissions*, THE WHITE HOUSE (May 15, 2009), http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Military-Commissions/.

²¹¹ *Accused 9/11 Plotter Khalid Sheikh Mohammed Faces New York Trial*, CNN (Nov. 13, 2009), <http://edition.cnn.com/2009/CRIME/11/13/khalid.sheikh.mohammed/index.html>.

²¹² Military Commissions Act of 2009, div. A, tit. XVIII, § 1802, 123 Stat. 2574, 2582 (2009) (codified at 10 U.S.C. § 948a); *House Passes Changes to Guantánamo Military Commissions*, ACLU (Oct. 8, 2009), <https://www.aclu.org/national-security/house-passes-changes-guantanamo-military-commissions>.

²¹³ Military Commissions Act of 2009, 123 Stat. at 2587.

²¹⁴ *House Passes Changes to Guantánamo Military Commissions*, *supra* note 212.

²¹⁵ BRAVIN, *supra* note 100, at 363.

Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force includes the authority for the Armed Forces of the United States to detain covered persons . . . pending disposition under the law of war.²¹⁶

This detention, however, could be indefinite, on U.S. soil, and extends so far as to cover U.S. citizens, *in even their private homes*, as well as aliens—clearly a violation of due process. Section 1022 requires that foreigners, not citizens or lawful resident aliens, be held in military custody rather than civilian custody.²¹⁷ Thus, they may be military prisoners subject to military jurisdiction and not subject to outside civilian jurisdiction. The 2012 NDAA included Section 1027, which prohibits using defense funds to transfer Guantanamo detainees off base.²¹⁸ They are permanently there until Congress or their home country funds their transfer, or the president disposes of their cases via adjudication. Amnesty International noted “The bill will make President Obama the first President since the red scare in the McCarthy era to sign a law to introduce indefinite detention in the US. It will keep the detention facility at Guantanamo Bay, open [sic] potentially forever.”²¹⁹

All in all, the detainees at Guantanamo have been waiting over a decade for trial. Their rights have all fallen flat on their faces in the wake of Bush and Obama with hundreds of individuals left in uncertain and indefinite detention—a fate to which America never subjected its worst enemies before this War on Terror.

²¹⁶ National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, div. A, tit. X, § 1021, 125 Stat. 1298, 1562 (2009).

²¹⁷ *Id.* at § 1022, at 1563-64 (2009).

²¹⁸ *Id.* at § 1027, at 1566-67 (2009).

²¹⁹ Geneve Mantri, *House Passes NDAA & White House Won't Veto Indefinite Detention*, AMNESTY INT'L HUMAN RIGHTS NOW BLOG (Dec. 15, 2011, 3:26 PM), <http://blog.amnestyusa.org/us/house-passes-ndaa-white-house-wont-veto-indefinite-detention/>.

And what did America get out of all of this? Certainly not the speedy and satisfying prosecution of the 9/11 masterminds, and certainly not peace or justice: “the maximum number of prisoners that the US military intends to prosecute, or has already prosecuted, is 20—or just 2.5 percent of the 779 men held at the prison since it opened in January 2002.”²²⁰ Khalid Shaikh Mohammed’s trial was transferred back to the military at Gitmo, despite Attorney General Eric Holder’s public promises and private objections.²²¹ A decade after 9/11 we still have nothing to show for this clearly failed, irreparable experiment besides a litany of monumental civil liberties violations.

2. *Obama’s Drone Wars*

The institutionalization of executive orders creating extra-constitutional judicial processes at the whim of the president has culminated in the ultimate executive power over the right to life. President Obama has brought this dark legal tradition to new extremes by creating CIA adjudication processes that make legal determination with respect to citizens’ right to life. To date, four American citizens have been targeted and killed by drones without any process before a judicial court.

President Clinton began the U.S. weaponized drone program.²²² After an aerial drone spotted bin Laden in October 2000, President

²²⁰ Andy Worthington, *US Military Admits Only 2.5 Percent of All Prisoners Ever Held at Guantánamo Will Be Tried*, ANDY WORTHINGTON, (Mar. 18, 2013), <http://www.andyworthington.co.uk/2013/06/18/us-military-admits-only-2-5-percent-of-all-prisoners-ever-held-at-guantanamo-will-be-tried/#sthash.xFKv1Quf.dpuf>.

²²¹ Jayson Ryan, *In Reversal, Obama Orders Guantanamo Military Trial for 9/11 Mastermind Khalid Sheikh Mohammed*, ABC NEWS (Apr. 4, 2011), <http://abcnews.go.com/Politics/911-mastermind-khalid-sheikh-mohammed-military-commission/story?id=13291750>.

²²² LLOYD C. GARDNER, *KILLING MACHINE: THE AMERICAN PRESIDENCY IN THE AGE OF DRONE WARFARE* xii (The New Press, 2013).

Clinton was frustrated that he could not simply push a button to end bin Laden's life. "President Clinton gave orders to create an armed drone force."²²³ That program came to fruition under President Bush when on June 18, 2004, the first weaponized drone struck in Waziristan.

Prior to President Clinton, President Reagan had reiterated President Gerald Ford and President Jimmy Carter's ban on assassinations²²⁴ in Executive Order 12333.²²⁵ This order, very plainly, proscribed assassination, an undefined term. After the Khobar Tower Bombing in 1998, Clinton issued a Presidential Finding, or Memorandum of Notification, modifying the order proscribing assassinations.²²⁶ It now included an exception when capture was unfeasible and for specific people, which, of course, included bin Laden and his captains.²²⁷ After 9/11, the Bush Administration amended Clinton's Finding to remove the restrictive list of names and non-feasibility-of-capture requirement.²²⁸ After that, as weaponized drones grew into Obama's favorite war machine. Of course, because of the definitional flexibility, drone operations later would not be classified as assassinations, but "targeted strikes."

Bush himself was reluctant to use the weapons.²²⁹ Conversely, "Obama had already authorized as many drone strikes in [his first] ten months [in office] as Bush had in his entire eight years in of-

²²³ *Id.* at xii, 128.

²²⁴ President Ford signed Executive Order 11905 in 1976, banning political assassinations, which President Carter expanded on in Executive Order 12036 in 1978. United States Intelligence Activities, 43 Fed. Reg. 3674 (Jan. 24, 1978); United States Foreign Intelligence Activities, 41 Fed. Reg. 7703 (Feb. 18, 1976).

²²⁵ United States Intelligence Activities, 46 Fed. Reg. 59941 (Dec. 4, 1981).

²²⁶ GARDNER, *supra* note 221, at 129; Ian G. R. Shaw, *The Rise of the Predator Empire: Tracing the History of U.S. Drones*, UNDERSTANDING EMPIRE (2013), <http://understandingempire.wordpress.com/2-0-a-brief-history-of-u-s-drones/>.

²²⁷ GARDNER, *supra* note 221, at 129.

²²⁸ *Id.*

²²⁹ *Id.* at 128-29.

fice.”²³⁰ At this writing, Obama has authorized almost seven times as many: about 320 strikes to Bush’s 52, killing over 3,000 people.²³¹ Around 2% of those killed were high-level terrorist targets²³²—hardly a sufficient number of military targets to justify the attacks under international and domestic law conceptions of military proportionality in civilian-soldier death ratios.

The use of drones as general war machines lacks substantial or set guidelines from the U.S. military hierarchy. President Obama, when facing reelection and the (short-lived) prospect of a loss to Republican Mitt Romney, scrambled to create guidelines for their use by future presidents.²³³ However, since winning reelection, this effort has fallen by the wayside. Moreover, as the U.S. government pushes forth with proxy and drone wars throughout the globe, the president has claimed a new and awesome power. *President Obama claimed the unnatural and unconstitutional right to decide unilaterally which Americans shall die; and to do so on a whim.*

a. *The Four (Known) Killing Cases*

Using his fleet of drones, Obama killed four U.S. citizens between 2011 and 2013: Anwar al-Aulaqi, Samir Khan, Abdulrahman al-Aulaqi, and Jude Mohammed; only one of which, he claims to have done intentionally. Anwar al-Aulaqi and Samir Khan were killed together following several attempts on al-Aulaqi’s life. A few weeks later, al-Aulaqi’s teenage son, Abdulrahman, was struck supposedly unintentionally. Recently, Jude Mohammed, one of the

²³⁰ JEREMY SCAHILL, *DIRTY WARS: THE WORLD IS A BATTLEFIELD* 168-69, 251 (1st ed. 2013).

²³¹ *Out of Sight, Out of Mind: Victims*, PITCH INTERACTIVE (last updated July 3, 2013), <http://drones.pitchinteractive.com/>; Jack Serle & Chris Woods, *Six Month Update: U.S. Covert Actions in Pakistan, Yemen, and Somalia*, THE BUREAU INVESTIGATES (July 1, 2013), <http://www.thebureauinvestigates.com/2013/07/01/six-month-update-us-covert-actions-in-pakistan-yemen-and-somalia/>.

²³² GARDNER, *supra* note 221, at xii.

²³³ GARDNER, *supra* note 221, at xi.

new wave of ex-patriot jihadists, was killed in a drone strike. Of these four, Obama has only admitted to targeting Anwar al-Aulaqi directly, relegating the rest to collateral damage.

Anwar al-Aulaqi was born in New Mexico to parents who raised him in America until he was nine years old and then in Yemen as a moderate American Muslim.²³⁴ “In 1991, he returned to the United States [from Yemen], where he earned a bachelor’s degree at Colorado State University, wed a Yemeni cousin, and later received a master’s degree in Educational Leadership from San Diego State University.”²³⁵ After 9/11 he became an American media star, “called upon by scores of media outlets to represent a “moderate” Muslim view of the 9/11 attacks,” even addressing a *Pentagon* luncheon.²³⁶ Before he went to Yemen he had no U.S. criminal charges except two unproven patronizing prostitution complaints (which it is speculated were setups), and weak allegations of ties to 9/11 that the FBI dismissed.²³⁷

The government, on the other hand, presents a very different picture of Anwar al-Aulaqi. Al-Aulaqi fled the country to engage in jihad against the United States. He recruited for Al Qaeda in the Arabian Peninsula (AQAP) and was highly influential in encouraging global jihad and was particularly dangerous because of his ability to reach the English-speaking audience via the Internet.²³⁸ He became the leader of external operations for AQAP in the years between 2007 and 2011.²³⁹ The government further claimed he was involved in over a dozen different terrorist plots, including the Fort Hood Massacre, and the aborted efforts of the attempted Times

²³⁴ SCAHILL, *supra* note 229, at 31-33.

²³⁵ Meyer, *supra* note 235, at 244; *see also* SCAHILL, *supra* note 229, at 33-36.

²³⁶ SCAHILL, *supra* note 229, at 41-42, 45.

²³⁷ SCAHILL, *supra* note 229, at 37-38, 40-41. *See* Meyer, *supra* note 235, at 244-45 & nn. 97, 99.

²³⁸ Meyer, *supra* note 235, at 286.

²³⁹ *Id.*

Square Bomber.²⁴⁰ He had several run-ins with the FBI related to terrorism cases prior to leaving the country.²⁴¹ He proclaimed that war against the United States was a religious duty, blinding all Muslims such as himself.²⁴²

When the post-9/11 war hysteria came, “the crackdowns on Muslims and the wars abroad in Muslim countries” drove al-Aulaqi to leave for England in 2002.²⁴³ Specifically, he was stalked and interrogated by the FBI over his possible involvement in 9/11.²⁴⁴ He left London for Yemen permanently in 2003, meeting up with his uncle Saleh bin Fareed.²⁴⁵ With no publicly revealed evidence of criminal behavior, the United States branded him a terrorist in 2010 and began its CIA assassination plans.²⁴⁶

On September 30, 2011, “the United States ended [al-Aulaqi’s life . . . a drone fired a ‘barrage of Hellfire missiles’ at [al-Aulaqi’s] car.”²⁴⁷ His car also carried Samir Khan, a “proud” jihadist from Queens, New York and fellow ex-patriot, who was killed as “collateral damage” in that strike.²⁴⁸

A few weeks after the missiles took out Anwar and Samir, the third American citizen was killed by a missile fired from a drone in

²⁴⁰ *Id.*

²⁴¹ *Id.* at 244-45 n.27.

²⁴² *Id.* at 246.

²⁴³ SCAHILL, *supra* note 229, at 37-38, 47.

²⁴⁴ *See id.* at 67-74; Meyer, *supra* note 235, at 244-45 & n.97.

²⁴⁵ *See* SCAHILL, *supra* note 229, at 67, 74; Meyer, *supra* note 235, at 244-45.

²⁴⁶ Designation of ANWAR AL-AULAQI Pursuant to Executive Order 13224 and the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, 75 Fed. Reg. 43233-01 (July 16, 2010).

²⁴⁷ Meyer, *supra* note 235, at 246 (quoting Mark Mazzetti et al., *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES (Sept. 30, 2011), http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all&_r=0).

²⁴⁸ Mark Mazzetti et al., *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES (Sept. 30, 2011), http://www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html?pagewanted=all&_r=0. *See also* SCAHILL, *supra* note 229, at 501-503.

Yemen. Abdulrahman al-Aulaqi, Anwar's sixteen-year-old son was killed in Yemen.²⁴⁹ After initially feigning ignorance, the government accepted responsibility for Abdulrahman's murder.²⁵⁰ The fourth and final citizen, twenty-three year old Jude Mohammed from Raleigh, North Carolina, was wanted by the FBI for his jihadist activities and was "killed with about 12 other insurgents in what the C.I.A. calls a "signature strike" in May 2013.²⁵¹

b. *Targeting "Due" Process: CIA Adjudication and Secret Law*

How exactly did Obama arrive at the conclusion he could kill these Americans, including a teenager? Tara McKlevey wrote an article on the process for *Newsweek* in 2011 entitled *Inside the Killing Machine*.²⁵² Relying on that work, a law student summarized the process succinctly:

An individual must meet the CIA's legal standard to be classified as a terrorist that is subject to targeted killing. Pursuant to a secret 50-page Department of Justice white paper outlining the terrorist classification process, approximately 10 CIA Counterterrorism Center attorneys receive a 'two page document,' along with 'an appendix with supporting information, if anybody want[s] to read all of it.' The attorneys then prepare a 'cable' that 'often run[s] up to five pages.' Senior attorneys will review the cable for errors, such as if 'the justification [in approving a person for lethal operation] would be that the person was thought to

²⁴⁹ SCAHILL, *supra* note 229, at 496, 507.

²⁵⁰ *See id.* at 507-509.

²⁵¹ Scott Shane & Eric Schmitt, *One Drone Victim's Trail from Raleigh to Pakistan*, N.Y. TIMES (May 22, 2013), http://www.nytimes.com/2013/05/23/us/one-drone-victims-trail-from-raleigh-to-pakistan.html?_r=0.

²⁵² Tara McKlevey, *Inside the Killing Machine*, NEWSWEEK (Feb. 21, 2011), <http://www.thedailybeast.com/newsweek/2011/02/13/inside-the-killing-machine.html>.

be at a meeting [but was not].’ The cable is then sent to the CIA’s General Counsel for approval. At any given time, there are about thirty individuals approved for targeting.²⁵³

President Obama himself approves the final orders to kill.²⁵⁴

The issues are multifold and relate to basic, elementary Fifth Amendment rights. First, no one outside the administration knows what this white paper says in full, so no one can address the standard by which targets are to be judged. Second, there is so little attention paid to the adjudication of guilt before the assignment of a death sentence—the process described here isn’t even a tenth of what is due for the average possession of marijuana trial. Third, there are no adversarial lawyers or notice in this system: The bomb is the notice.

Organizations like the ACLU and the Center for Constitutional Rights (CCR) filed suit to get this “power” declared unconstitutional. However, they didn’t even know over what they were suing: The legal justification itself, the infamous DOJ White Paper, was classified. In *New York Times Co. v. U.S. Dep’t of Justice*, the ACLU, CCR, and *New York Times* sued when their Freedom of Information Act request for the justification was denied.²⁵⁵

One month after the *Times* opinion, the government declassified a redacted version of it and leaked that version to NBC News. Other courts chimed in after the release of the redacted version of the White Paper, declassifying it and related documents.²⁵⁶ But to this day, the full memo remains classified.

²⁵³ Meyer, *supra* note 235, at 280 (quoting and citing McKlevey, *supra* note 252).

²⁵⁴ See *Islamist Cleric Anwar al-Awlaki Killed in Yemen*, B.B.C. NEWS (Sept. 30, 2011), <http://www.bbc.co.uk/news/world-middle-east-15121879>.

²⁵⁵ *New York Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013) (McMahon, J.).

²⁵⁶ See, e.g., *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013) (Garland, C.J.).

c. *The al-Aulaqi Case*

Anwar al-Aulaqi's father Nasser al-Aulaqi sued to enjoin the federal government from lethally targeting his son before Anwar was killed in. In *al-Aulaqi v. Obama*, the judge dismissed the case on standing grounds, issuing no real decision on the merits.²⁵⁷ After their sons were murdered, Nasser and Samir Khan's families refiled under *al-Aulaqi v. Panetta*, which at the time of this writing is pending disposition.

In dismissing the case, U.S. District Court Judge John Bates issued two holdings. First, that Nasser al-Aulaqi lacked standing to sue because he wasn't Anwar or a properly interested third party.²⁵⁸ Second, that the case presented a nonjusticiable "political question."²⁵⁹

The first holding makes sense and likely will be remedied in the ongoing *Panetta* litigation. However, the second holding, referencing that "courts are functionally ill-equipped to make the types of complex policy judgments that would be required to adjudicate the merits of plaintiff's claims," shows the aversion judges have to standing between the political branches during wartime.²⁶⁰ Think about it: A father asks a court to prevent the president from killing the father's uncharged, untried, unconvicted, non-violent son, and an American federal judge who took an oath to uphold the Constitution declines to hear the case. How far we have come after these Bush/Obama years from even a hopeful expectation of rudimentary due process. While the courts may avoid hearing cases that challenge its equality with the other two branches, and avoid some cases they shouldn't hear, the political question doctrine cannot be used as a shield behind which courts may cower as they fail to dis-

²⁵⁷ *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 46-47 (D.D.C. 2010) (dismissing for lack of standing and giving dicta on the political question doctrine).

²⁵⁸ *Id.* at 40.

²⁵⁹ *Id.* at 52.

²⁶⁰ *Id.* at 52.

charge their constitutional obligations pursuant to Article III; duties the American system of justice expects them to exercise before patently unlawful, irreversible, and lethal action is taken by the government.

The Supreme Court in *Baldwin v. New York* expressly set the only acceptable process of law for capital federal offenses: full trial.²⁶¹ Al-Aulaqi never even had a violent offense on his U.S. record,²⁶² but the president decided that he should die. That is not due process under the substantial (basic fairness) or the procedural (a jury decides facts) requirements of the Fifth Amendment.

Moreover, people in al-Aulaqi's position—that is, those accused by the government of treason—have even more protections. In Article III of the Constitution, the Founders made another advance in codifying the rights of even the most hated criminals: spies and traitors.²⁶³ They grafted into the Constitution a restrictive and exclusive definition of the crime of treason, and enumerated protections for those within its ambit:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the

²⁶¹ *Baldwin v. New York*, 399 U.S. 117, 119-20 (1970) (“[T]he federal right to jury trial attaches where an offense is punishable by as much as six months’ imprisonment. I think this follows both from the breadth of the language of the Sixth Amendment, which provides for a jury in ‘all criminal prosecutions,’ and the evidence of historical practice.”).

²⁶² Meyer, *supra* note 235, at 244-45 & n.97 (discussing Anwar al-Aulaqi’s criminal history).

²⁶³ See *id.* at 237-38 & nn.55-56 (2013) (citing *United States v. Rodriguez*, 803 F.2d 318, 320 (7th Cir. 1986)) (“Mindful of their status as traitors while fighting the rule of England, they sought to eliminate the potential for state abuse of the crime against groups with public grievances by including systemic, constitutional restrictions.”); JAMES WILLARD HURST, *THE LAW OF TREASON IN THE UNITED STATES: COLLECTED ESSAYS* 131 (Stanly I. Kutler, ed. 1971)

same overt Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.²⁶⁴

In the Federalist 43, James Madison describes the inclusion of a Treason Clause as addressing a “peculiar danger” and a “great judgment.”²⁶⁵ What exactly was this danger? England was none too kind to traitors, and did not afford those accused of the crime much protection.²⁶⁶ The Founding Fathers believed the harsh treatment of traitors as compared to other criminals resulted from the judge, jury, prosecutor, and lawmakers’ sentiments being distorted by the unique feeling of harm following an attack on the government, as Randolph Bourne described.²⁶⁷ Accordingly, with the Treason Clause, the Founding Fathers rejected 700 years of English precedent and ensconced a bias in favor of the freedom to express dissenting opinion, in negative constitutional clothing, at the expense of the national security prerogatives of the government.²⁶⁸

Thus, in the Treason Clause, the Founding Fathers ensconced a protection especially relevant in the al-Aulaqi case:

If nothing else, the Treason Clause—and its specific allocation of the responsibility for resolving treason cases to eve-

²⁶⁴ U.S. CONST. art. III, § 3.

²⁶⁵ THE FEDERALIST NO. 43 (James Madison).

²⁶⁶ Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens*, 2011 UTAH L. REV. 1203, 1205-1206, 1215 (2011); see also Meyer, *supra* note 235, at 237-38 & nn.55-56 and accompanying text.

²⁶⁷ See HURST, *supra* note 263, at 143 (quoting Rufus King); BOURNE, *supra* note 16, at *4-9 (1918) (describing the harm a jingoist feels at the sound of treason); Carlton F.W. Larson, *The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem*, 154 U. PA. L. REV. 863, 873 (2006) (quoting James Wilson); Meyer, *supra* note 235, at 232-33.

²⁶⁸ HURST, *supra* note 263, at 165-66.

ry branch *other* than the Executive—means that the President, and those who serve at his pleasure, should not act as prosecutor, defense counsel, judge, jury, and executioner, especially in secret.²⁶⁹

The simple appearance of the Treason Clause within the Article concerning the Judiciary and not the President makes abundantly clear that the president, military, and intelligence community may not adjudicate treason cases. Taking it a step further, that means that the CIA can't then determine a citizen is levying war against his country (jihad), and then execute him or her without due process. It is unconstitutional on the face of the Fifth Amendment and Article III.²⁷⁰

While the jurisprudence of targeted killing is far from settled—one district court opinion not on point with another pending is hardly a body of law—the precedent set is rather dangerous. The right to process for crimes before a public court has been severally abrogated in so called “national security” cases, far beyond the prevailing acceptable constitutional norms. The legal institutions for this tradition have been built up over the last one-hundred-and-fifty years through the carving out of military commission exceptions, to unilateral detention powers, to kill order powers.

II. THE FIRST AMENDMENT

The Freedom of Speech is one of the oldest battlegrounds for national security incursions on personal liberty. As early as 1798, there was precedent for statutory suppression of political speech. During World War I, the stakes were raised for anti-war speech with stiffer prison sentences and widespread assaults on liberty. From World War II through to the Second Red Scare, First Amend-

²⁶⁹ Meyer, *supra* note 235, at 288-89.

²⁷⁰ See, e.g., Philip Dore, *Greenlighting American Citizens: Proceed with Caution*, 72 LA. L. REV. 255, 286 (2011).

ment rights continued to face brazen assault. It was not until the Warren Court that the law favored speech over security.

This section begins by describing President Adams and the Federalists' repression of the freedom of speech in the 1798 Alien and Sedition Acts. It traces President Wilson's repression via the Espionage Act of 1917 and the Sedition Act of 1918, to FDR and the Smith Act, and through the Warren Court to the modern era. It concludes that while the battle has been largely won since the Warren Court generally became more faithful to the Jeffersonian view of the freedom of speech and specifically in the national security context, there are still areas of First Amendment law where additional protections are needed to comport with natural law and constitutional norms.

A. EARLY AMERICA: ALIEN AND SEDITION ACTS OF 1798

In the late 1790s, the federal government initiated its first statutory encroachment upon free speech and the First Amendment: The Alien and Sedition Acts of 1798.

The French Revolution had a profound political impact on the US in the 1790s. After the French revolt, every major European power declared war on France in fear that their own respective monarchies would suffer challenges to their authority. Under the leadership of President Washington, the United States maintained a strict policy of "unity at home and neutrality abroad."²⁷¹ In its refusal to support either the British or the French in the aftermath of the French Revolution, the U.S. incurred the hostility of both countries.²⁷²

In 1796, after a bitter presidential election between John Adams, a Federalist, and Thomas Jefferson, a Democratic-Republican, John

²⁷¹ See George Washington, Washington's Farewell Address, in 4 ANNALS OF CONG. 2869, 2869-80.

²⁷² STONE, *supra* note 49, at 21.

Adams became the second President of the United States.²⁷³ He was eager to negotiate an agreement with France. He dispatched a delegation to Paris.²⁷⁴ But when the American emissaries arrived, French intermediaries informed them that the French foreign minister would not meet with the Americans unless certain concessions, including cash bribes, were made, concessions which the American envoys were not willing to make.²⁷⁵ After the American envoys rejected two French demands, the French foreign minister, the Marquis de Talleyrand, threatened to invade the United States.

Word reached Adams back in Washington, prompting a wave of patriotic fervor to sweep the nation and leading to a call for a formal declaration of war against France.²⁷⁶ The Republicans became suspicious of Adams and demanded to see copies of the correspondence between Adams and his lead emissary, John Marshall. Adams obliged; however, he replaced the names of the French intermediaries and Talleyrand with the letters W, X, Y and Z.²⁷⁷ The events which almost led to the "quasi-war" with France have been referred to by historians as the "XYZ affair."

The relationship between the political parties became even more adversarial following the crisis in Europe.²⁷⁸ Republicans saw the possibility of war with France as "an extension of the American promise of liberty, republicanism, and democracy,"²⁷⁹ while the Federalists saw it as "a clear and present danger to the established order."²⁸⁰ After dispatching a new set of emissaries to Paris, Adams was eventually able to negotiate peaceful terms between the United

²⁷³ *Id.* at 22.

²⁷⁴ William Stinchcombe, *The Diplomacy of the WXYZ Affair*, 34 WM. & MARY Q. 590-617 (1977).

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ STONE, *supra* note 49, at 25.

²⁷⁹ *Id.* at 25.

²⁸⁰ *Id.* at 26.

States and France with Napoleon who in November 1799 overthrew the French Directory.²⁸¹

At this critical juncture, the Federalists seized the opportunity to strike a major blow at the Republicans. The Federalist-controlled Congress enacted legislation designed to quash both dissenting opinion and their opponents, the Republican Party. They called their new law the Alien and Sedition Acts of 1798.²⁸² The legislation was composed of four acts: the Alien Enemies Act, the Alien Friends Act, the Sedition Act, and the Naturalization Act.²⁸³ The Sedition Act went furthest in eroding fundamental free speech rights and the Act became the centerpiece legislation of the Federalist Congress. Throughout the rest of U.S. history, based on this precedent, the nation's wartime sedition-type acts would repeat as a principal instrument in repressing American liberty.

Section two of the Act reads, in part:

That if any person shall write, print, utter or publish . . . any false, scandalous, and malicious writing or writings against the government of the United States, or either house of Congress of the United States, or the President of the United States, with the intent to defame [them], or to bring them [into] contempt or disrepute; or to excite against them [the] hatred of the good people of the United States, . . . then such person . . . shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.²⁸⁴

²⁸¹ GEORGE BILLIAS, *ELBRIDGE GERRY, FOUNDING FATHER AND REPUBLICAN STATESMAN* (McGraw-Hill 1976).

²⁸² STONE, *supra* note 49, at 28.

²⁸³ See 1 Annals of Cong. 567-568; 570-572; 577-578; 596-597.

²⁸⁴ Ch. 74, § 2, 1 Stat. 596 (1798).

Containing a sunset provision, the Act automatically expired at the end of Adams' term.²⁸⁵ "The ability of the opposition press to attack the Alien and Sedition Acts was chilled by the prospect of prosecution under the Acts themselves."²⁸⁶ Supporters of the Act justified the legislation as an emergency power that was necessary to save the country in light of the prospect of war; a war with France that would never come.

The Federalists' action flew in the face of the fundamental principle of free speech: "If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."²⁸⁷ How could the same generation, in some instances, the same human beings that wrote "Congress shall make no law . . . abridging the freedom of speech," enact a law that did just that?

In the course of the congressional debates on the passage of the Alien and Sedition Acts of 1798, several Republicans became widely recognized and despised by the Federalists.²⁸⁸ One such Republican was Congressman Matthew Lyon of Vermont. In the October 1st 1798 issue of a magazine that he had established in Vermont, Lyon proclaimed:

When the executive puts forth a proposition injurious to my constituents and the Constitution, I am bound by oath . . . to oppose it; if outvoted, it is my duty to acquiesce—I do so; But measures which I opposed [in Congress] as injurious

²⁸⁵ Nancy Murray, *Civil Liberties in Times of Crisis: Lessons from History*, 87 MASS. L. REV. 72 (2002).

²⁸⁶ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1502 (1987).

²⁸⁷ JOHN STUART MILL, ON LIBERTY 87 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

²⁸⁸ Paul S. Guilles, *The Trial of Matthew Lyon*, 2011 VT. B.J. 7 (Summer 2011).

and ruinous to the liberty and interest of this country . . . you cannot expect me to advocate at home.²⁸⁹

On October 5, 1798, a federal grand jury indicted Matthew Lyon for sedition.²⁹⁰ The indictment officially charged Congressman Lyon with “malicious” intent “to bring the President and government of the United States into contempt” and that he had violated the Sedition Act both by accusing the Adams administration of fostering “ridiculous pomp, foolish adulation, and selfish avarice, and by quite thoroughly stating in his magazine that President Adams should go to a “mad house.” After an hour of deliberation, the jury returned a guilty verdict. Justice Paterson of the Supreme Court, serving as a Circuit Justice, imposed a sentence of four months in jail and a fine of one thousand dollars.²⁹¹

What happened next is truly inspiring. Congressman Lyon launched a vigorous congressional reelection campaign. From inside his jail cell he championed his cause of natural rights and free speech with the U.S. Constitution as his platform.²⁹² Not only did Lyon win a stunning re-election victory, but several thousand Americans signed a petition asking President Adams to pardon him. The States of Virginia and Vermont competed to raise funds for Lyon, eventually raising almost double the fine amount.²⁹³

Individuals in Congress were not the only ones who saw through the haze of quasi-war patriotism to the unconstitutional nature of the Alien and Sedition Acts. Kentucky and Virginia both

²⁸⁹ STONE, *supra* note 49, at 49 n.130 (citing JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 22 (Cornell 1956)).

²⁹⁰ Guilles, *supra* note 287.

²⁹¹ *Id.* (citing THE TRIAL OF MATTHEW LYON FOR A SEDITIOUS LIBEL, 6 AM. ST. TRIALS 689 (John Davison Lawson ed., 1916)).

²⁹² STONE, *supra* note 49, at 52.

²⁹³ *Id.* at 52.

passed resolutions²⁹⁴—said to have been drafted by Thomas Jefferson and James Madison, respectively and written incognito—which declared that the Alien and Sedition Acts were unconstitutional and unenforceable.²⁹⁵ Several other states, like Rhode Island, rejected the open-ended claims of Kentucky and Virginia that a state could nullify federal law; however, the resolutions and the Republicans that authored them, were “triumphantly vindicated” when in the election of 1800, the Federalists were thrown out of office and the Republicans gained control of both Congress and the Presidency.²⁹⁶ With the influx of new elected officials, America saw an end to the destructive Alien and Sedition acts. Congress repealed the Naturalization Act in 1802, and with the exception of the Alien Enemies Act, the other acts were allowed to expire.²⁹⁷

The Alien and Sedition Acts, one of the earliest precedents in American history, had a resounding impact on permissible suppression during war in the next century. President Adams and the Federalists’ more royalistic view of free speech became the groundwork for President Wilson, FDR, and President Truman’s suppression of free speech in the next century’s historic global turmoil.

B. TURN OF THE CENTURY AMERICA: THE WILSON ADMINISTRATION AND WORLD WAR I

If one wanted to find a point before 1917 where anyone in America could be charged with “conspiracy to publish disloyal material intended to . . . cause contempt for the government of the

²⁹⁴ THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, 1787, at 540 (Jonathan Elliot, ed., 1866).

²⁹⁵ Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1502 (1987).

²⁹⁶ *Id.*

²⁹⁷ *Alien and Sedition Acts: Primary Documents of American History*, LIBRARY OF CONGRESS, <http://www.loc.gov/rr/program/bib/ourdocs/Alien.html> (last updated Nov. 13, 2013).

United States,” and receive a multi-year prison sentence for it, one needed to look all the way back to the era of the Alien and Sedition Acts.²⁹⁸ But President Woodrow Wilson, like President John Adams before him, did not permit words on a piece of parchment to stop him from using governmental power to silence political opposition. While Woodrow Wilson is famous for World War I,²⁹⁹ this section focuses on Wilson’s other war: His infamous war on dissident and ‘disloyal’ opinion in the United States.³⁰⁰ Specifically, this section focuses on the use of the congressional acts as a contrivance to carry out the Wilson Administration’s crackdown on free and *rightful* expression through the War and subsequent Red Scare, and the Supreme Court precedent *upholding* these abuses—despite clear and profound First Amendment impediments—which would not be corrected until *Brandenburg v. Ohio*, generations later and after lives were lost.³⁰¹

1. *The Advent of State Secrecy Statutes: The Defense Secrets Act of 1911 and Espionage Act of 1917*

Prior to 1911, the United States government didn’t codify many national security laws. This began to change in 1909, when Congress enacted laws which made giving intelligence to the enemy treasonable, proscribed the unlawful entry onto military bases, and prohibited the theft of government property or records.³⁰² These

²⁹⁸ See STONE, *supra* note 49, at 145 (“For 120 years, from the expiration of the Sedition Act of 1798 until America’s entry into World War I, the United States had no federal legislation against seditious expression. The lessons of 1798 had carried the nation through the War of 1812, the Mexican War, the Civil War, and the Spanish-American War.” (footnotes omitted)).

²⁹⁹ E.g., JIM POWELL, *WILSON’S WAR: HOW WOODROW WILSON’S GREAT BLUNDER LED TO HITLER, LENIN, STALIN, AND WORLD WAR* (2005).

³⁰⁰ STONE, *supra* note 49, at 170, 179-80.

³⁰¹ See *infra* notes 344-349 and accompanying text; see also *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

³⁰² 35 Stat. 1088, 1097 (1909). While treason is defined and restricted in the Constitution, see U.S. CONST. art. III, § 3, it is criminalized at 18 U.S.C. § 2381, and has been

provisions were, in some sense, the first state secret, or espionage, statutes created, but they were of “general applicability,”³⁰³ not specifically applicable to spilling the national secret beans, so to speak.

In 1911, during the Taft Administration, Congress took its “first attempt . . . to protect military information.”³⁰⁴ The final product was the Defense Secrets Act of 1911³⁰⁵ which ended up being a vague, barely-workable document, lacking an intent requirement or enumeration of to whom information may not be communicated. Despite Congress’ “lackadaisical”³⁰⁶ approach to national security at the time, it would not make the same mistake in 1917, when America entered World War I.

The Espionage Act of 1917³⁰⁷ was introduced to Congress in June of that year, following Woodrow Wilson’s April 2, 1917 request for a congressional declaration of war and Congress’ April 6 acquiescence. Congress, however, was not as obliging when it came to expanding the President’s powers, as “[h]eated debate [over the Act] stretched over two frenetic sessions.”³⁰⁸

When the bill was first introduced into the House, Congress took major issue with three of Wilson’s proposals. First, was the so-called press censorship provision³⁰⁹:

[T]he Wilson Administration proposed [either] to censor, or punish after the fact, (exactly which was never resolved) publication of defense information in violation of Presiden-

modified form time to time, *see, e.g.*, § 1088. The § 1097 rules created the crimes of unlawful entry and theft of property or “records.”

³⁰³ Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 939-40 & nn.26-28 (1973).

³⁰⁴ *Id.* at 939-40.

³⁰⁵ Act of Mar. 3, 1911 (Defense Secrets Act), ch. 226, 36 Stat. 1084 *repealed by* Espionage Act of 1917, ch. 30, 40 Stat. 217.

³⁰⁶ Edgar & Schmidt, *supra* note 303, at 940.

³⁰⁷ Pub. L. 65-24, 40 Stat. 217 (1917) (codified at 18 U.S.C. § 792).

³⁰⁸ Edgar & Schmidt, *supra* note 303, at 940.

³⁰⁹ STONE, *supra* note 49, at 147.

tial regulations. The desirability of such a measure was seen by its adherents to derive from the obvious harm that would befall military interests when untimely publications fell into enemy hands. Proponents of the measure pointed to the Civil War experience when the Union cause had been jeopardized by newspaper retailing of military plans.³¹⁰

Obviously, there was vehement disagreement over this provision. Rep. Edwin Webb (D-NC), argued in committee that “the press should be willing to give up its right to publish what the president ‘thinks would be hurtful to the United States and helpful to the enemy,’”³¹¹ adding “[U.S. citizens are in] one of those situations where we have to trust somebody.”³¹² He was met with substantial opposition, and that provision failed to pass in the House by forty votes.³¹³ The word “publish” appeared only once in the final bill, proscribing the publication of military information with intent to communicate it to the enemy, which incurs a penalty of up to thirty years in prison and a fine.³¹⁴

Another offensive proposal was the “disaffection” provision, which was described as “even more troublesome than the Sedition Act of 1798.”³¹⁵ The provision stated that “whoever[,] when the United States is at war, shall willfully cause or attempt to cause disaffection in the military or naval forces of the United States . . . shall be punished by . . . imprisonment for not more than twenty

³¹⁰ Edgar & Schmidt, *supra* note 303, at 940-41.

³¹¹ STONE, *supra* note 49, at 148 (quoting 55 CONG. REC. 1531 (1917)), reprinted in 1 CIVIL LIBERTIES IN WARTIME: LEGISLATIVE HISTORY OF THE ESPIONAGE ACT OF 1917 AND THE SEDITION ACT OF 1918 (William Manz, ed., 2007).

³¹² *Id.* (quoting 55 CONG. REC. 1532 (1917)).

³¹³ *Id.* at 148-49.

³¹⁴ Edgar & Schmidt, *supra* note 303, at 941.

³¹⁵ STONE, *supra* note 49, at 150 (citing *Espionage and Interference with Neutrality: Hearings on H.R. 291 before the H. Comm. on the Judiciary*, 65th Cong. 36-43 (1917) (statement of Gilbert E. Roe, Free Speech League)).

years”³¹⁶ The inclusion of the incredibly broad term ‘disaffection,’ literally “to alienate the affection or loyalty of . . . to fill with discontent and unrest,”³¹⁷ unsurprisingly caused much dismay to many members of Congress. The same Rep. Webb who lauded suppression of a free press, for example, defended the natural liberties of U.S. citizens when he argued that it would criminalize writing to a soldier to “‘tell him the sad conditions back home.’”³¹⁸

In final form, Section 3 of the Act provides:

[1] Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies [2] and whoever when the United States is at war, shall wilfully cause or attempt to cause *insubordination, disloyalty, mutiny, refusal of duty*, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than \$10,000 or imprisonment for not more than twenty years, or both.³¹⁹

The breadth of the disaffection provision, which restricts even private and whispered conversations, was at least abrogated by the Webb Amendment to a more specific class of speech, but still runs sweepingly afoul of the First Amendment’s protections. This section

³¹⁶ H.R. 291, 65th Cong. (as introduced by Rep. Webb, April 2, 1917), reprinted in 1 CIVIL LIBERTIES IN WARTIME: LEGISLATIVE HISTORY OF THE ESPIONAGE ACT OF 1917 AND THE SEDITION ACT OF 1918 (William Manz, ed., 2007); see also STONE, *supra* note 49, at 147.

³¹⁷ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 355 (11th ed. 2003).

³¹⁸ STONE, *supra* note 49, at 151 (quoting 55 CONG. REC. 1535 (1917)).

³¹⁹ The Espionage Act of 1917, Pub. L. 65-24, 40 Stat. 217, 219 (codified at 18 U.S.C. § 792) (emphasis added); STONE, *supra* note 49, at 151 (2004) (discussing the Webb amendment).

provided the basis for criminal prosecutions under the statute for “disloyal utterances” or attempting to interfere with recruitment or enlistment – speech completely protected by the First Amendment’s command that “Congress shall make no law . . . *abridging* the freedom of speech,”³²⁰ let alone *criminalizing* it.

A final constitutionally abhorrent provision of the Act was the nonmailability provision.³²¹ As first introduced, this provision granted the postmaster general the broad power to obstruct the delivery of mail which he believed was treasonous or anarchist in character.³²² The postmaster general would have the power to decide who gets what private letter or publication, *at his sole discretion*, due to its “disloyal” content. Congressmen, senators and representatives alike, were displeased with the sweeping legislation, which invaded the political privacy of individuals and stampeded over the right to private association.³²³ Some went as far as to call it “oppressive,” a “menace to freedom,” and “a far greater evil than the evil which is sought to be prevented.”³²⁴ In the end, the language was narrowed to permit the postmaster to carry out this task,³²⁵ but Congress essentially bent to the President’s will on the matter.³²⁶ What’s more, the Supreme Court and lower federal courts of the time generally upheld convictions of newspaper editors for their hand in disseminating disloyal material.³²⁷

³²⁰ U.S. CONST. amend. I.

³²¹ STONE, *supra* note 49, at 147, 149-50.

³²² *Id.* at 149-50.

³²³ *Id.*

³²⁴ *Id.* at 149 (quotations and citations omitted).

³²⁵ STONE, *supra* note 49, at 150.

³²⁶ This was not the first time Congress faced a nonmailability statute. In 1835, Congress rejected President Andrew Jackson’s attempt to get similar legislation approved. STONE, *supra* note 49, at 149.

³²⁷ See *infra* Part II.B.4 (discussing the federal judiciary).

2. *Sedition Act of 1918*

The Sedition Act of 1918³²⁸ represents one of the most constitutionally-repugnant laws ever enacted. With this act, however, the blame shifts to Congress. When the Wilson Justice Department first proposed what would become the Sedition Act of 1918, it sought to amend the Espionage Act “narrow[ly],” but the Senate Judiciary Committee “took it upon itself to go far beyond [the Justice Department]’s recommendations, resulting in [some of] the most repressive legislation in American history.”³²⁹

Montana’s Democratic Senators Henry Myers and Thomas Walsh introduced broad amendments to the original proposal modifying the Espionage Act which, when finally enacted, read:

[W]hoever, when the United States is at war, shall willfully utter, print, write or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States or the Constitution of the United States, or the military or naval forces of the United States, or the flag of the United States, or the uniform of the Army or Navy of the United States into contempt, scorn, contumely, or disrepute, or shall willfully utter, print, write, or publish any language intended to incite, provoke, or encourage resistance to the United States, or to promote the cause of its enemies, or shall willfully display the flag of any foreign enemy, or shall willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hin-

³²⁸ 40 Stat. 553 (1918).

³²⁹ STONE, *supra* note 49, at 184-85.

der the United States in the prosecution of war, and whoever shall willfully advocate, teach, defend, or suggest the doing of any of the acts or things in this section enumerated, and whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished by a fine of not more than \$10,000 or the imprisonment for not more than twenty years, or both³³⁰

The Justice Department and many Senators claimed that this amendment was needed to protect dissenters from crowds who would riot upon hearing disloyal statements.³³¹ This was what the government did: Instead of protecting the minority's right to put forth speech that may be offensive to the listener or punishing those who rioted in order to silence speech, the government arrested individuals for *speaking* under the guise of "protecti[ng]" the speaker from mob violence by criminalizing the spoken words. This is the sort of warped thinking that results from the wartime herd mentality Bourne decried in his composition "the State," which is discussed *passim*, but was published in 1918.³³²

Between the original 1917 Espionage Act, and the 1918 amendments known as the Sedition Act, the freedom of the press, the right to dissent, the right to *speak* "disloyal utterances," the right to political expression, and the freedom from cruel and unusual punishments (such as twenty years in federal custody for publicly or *privately* disagreeing with the President), had been excised from the Constitution, and replaced with statutes levying decades-long prison sentences upon those who whispered against Wilson's War.

³³⁰ 40 Stat. 553-54 (1918).

³³¹ STONE, *supra* note 49, at 184-85, 188-89.

³³² Geoffrey Stone, who this work often cites, decries this act as well. *See id.* at 184-85.

There is no question that these Acts laid the groundwork for an unconstitutional and unprecedented—even by the standards of the 1798 Acts—expansion of Executive power at the expense of personal liberty.

3. *Wilson's Domestic War on Americans: Political Suppression in the United States*

In order to enforce the wildly unpopular draft, the Espionage Act of 1917, and the Sedition Act of 1918, the Justice Department decided to enlist the help of mobs and thugs. Attorney General Thomas Gregory, “[i]n the first month of the war, . . . asked loyal Americans to act as voluntary detectives and to report their suspicions directly to the Department of Justice.”³³³ Hundreds of thousands of “loyal” Americans signed up to inform on their countrymen in “voluntary associations.”³³⁴ These voluntary associations were effectually an unconstitutional domestic spying and enforcement arm of the Justice Department:

With implicit immunity [from the courts and Justice Department], they engaged in wiretaps, breaking and entering, bugging offices, and examining bank accounts and medical records. Vigilantes ransacked the homes of German Americans. . . . Matters had gotten so far out of hand [by the end of the war], however, that such pleas [for sanity and normal process of law] were essentially ignored.³³⁵

The endorsement and implicit immunity from prosecution created a clear enough link between these groups that they should be construed as state actors.³³⁶ A report from the National Civil Liber-

³³³ *Id.* at 156.

³³⁴ *Id.*

³³⁵ *Id.* at 157.

³³⁶ *Id.*

ties Bureau found 164 incidents of mob violence related to the War between April 1917 and March 1919, and noted the underreporting of “hundreds of cases.”³³⁷

More than 2000 prosecutions were initiated under the Espionage and Sedition Acts between 1917 and 1921.³³⁸ Of the few hundred reported prosecutions in 1919, the National Civil Liberties Bureau calculates that 103 individuals received sentences of ten to thirty-five years for disloyal utterances, while barely more than thirty acquittals for either *treason* or espionage were reported.³³⁹ In a true testament to wartime hysterical absurdity, Robert Goldstein, producer of the film *The Spirit of '76*, a patriotic picture about the American Revolution, was convicted under the Sedition Act because the film portrayed a historical massacre of Americans, where “British soldiers bayoneted women and children.”³⁴⁰ The reasoning: it tended to promote insubordination in the contemporary American military by making an ally look bad *through portraying historically accurate events*.³⁴¹ These were not the only oppressive acts taken by the Justice Department and permitted by the judiciary. Walter Matthey was convicted and sentenced to a year in prison under the Espionage Act for *listening to and applauding at a speech* which itself con-

³³⁷ NATIONAL CIVIL LIBERTIES BUREAU, WAR-TIME PROSECUTIONS AND MOB VIOLENCE: INVOLVING THE RIGHTS OF FREE SPEECH, FREE PRESS AND PEACEABLE ASSEMBLAGE, 3-11 (1919), available at <https://archive.org/details/wartimeprosecuti01amer>.

³³⁸ JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 191 (2007).

³³⁹ NATIONAL CIVIL LIBERTIES BUREAU, *supra* note 337, at 41-43.

³⁴⁰ STONE, *supra* note 49, at 172-73.

³⁴¹ *Id.* at 173.

tained “disloyal utterances.”³⁴² A California man was jailed for *laughing* at Army Drills.³⁴³

4. *The Supreme Court Abides*

With federal courts all but endorsing mob violence, assaults on natural liberty and sentences abounding throughout the courts to the tune of ten, twenty, or thirty years in prison for speech alone, and an out-of-control Justice Department, how would the Supreme Court respond? In a series of decisions handed down during the War and the Red Scare, the Supreme Court—the counter-majoritarian branch *designed* to protect the rights of the minority against the oppression of an overbearing majority—*abided*. Between 1918 and 1921, the Supreme Court handed down opinions in *Schenck v. United States*,³⁴⁴ *Frohwerk v. United States*,³⁴⁵ *Debs v. United States*,³⁴⁶ *Abrams v. United States*,³⁴⁷ *Schaefer v. United States*,³⁴⁸ and *Pierce v. United States*,³⁴⁹ which stamped as legitimate the persecutions under the Espionage and Sedition Acts.

The first of these six cases, *Schenk*, involved the appeal of two defendants convicted of publishing a pamphlet that called the draft “unlawful.”³⁵⁰ The pamphlet “confined itself to peaceful measures such as a petition for the repeal of the act.”³⁵¹ The First Amendment provides that “Congress shall make *no* law . . . abridging the free-

³⁴² DEPARTMENT OF JUSTICE, REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES FOR THE YEAR 1922, at 437 (1922); *see also* STONE, *supra* note 49, at 173.

³⁴³ Walter Coffey, *Espionage, Sedition and Fascism in World War I*, WALTERCOFFEY.COM (Dec. 6, 2012), <http://waltercoffey.wordpress.com/2012/12/06/espionage-sedition-and-fascism-in-world-war-i/>.

³⁴⁴ 249 U.S. 47 (1919) (Holmes, J.).

³⁴⁵ 249 U.S. 204 (1919) (Holmes, J.).

³⁴⁶ 249 U.S. 211 (1919) (Holmes, J.).

³⁴⁷ 250 U.S. 616 (1919) (Clarke, J.).

³⁴⁸ 251 U.S. 466 (1920) (McKenna, J.).

³⁴⁹ 252 U.S. 239 (1920) (Pitney, J.).

³⁵⁰ *See* 249 U.S. 47 (1919).

³⁵¹ *Id.* at 51.

dom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”³⁵² Thus, this case seems as though it would have an obvious result. However, in a truly stunning move, Justice Holmes, writing for a unanimous court, upheld the convictions because the speech presented a “clear and present danger” to Congress’ successful provisioning of the army for the war.³⁵³ Later realizing his folly, Justice Holmes would reverse course and change his First Amendment jurisprudence on how to apply the “clear and present danger” test; but not until after much damage to life and liberty had come to pass in its name.³⁵⁴

Seven days after *Schenck*, the Supreme Court decided *Frohwerk v. United States*.³⁵⁵ Frohwerk was a copy editor for a Chicago-based paper.³⁵⁶ Some of the articles he edited were anti-draft articles, none of which he wrote.³⁵⁷ Nevertheless, he was convicted of violating and conspiring to violate the Espionage Act, and sentenced to ten years.³⁵⁸ Justice Holmes, again writing for a unanimous court and citing *Schenck*, upheld the convictions.³⁵⁹

The same day as *Frohwerk*, the court decided the fate of Eugene V. Debs, the nationally recognized leader of the Socialist Party and perennial presidential candidate, in *Debs v. United States*. Debs had given a speech which “eulog[ized]” the draft opponents in jail, and “expressed opposition to Prussian militarism in a way that naturally might have been thought to be intended to include the mode of

³⁵² U.S. CONST. amend. I (emphasis added).

³⁵³ *Schenck*, 249 U.S. at 52-53.

³⁵⁴ See generally THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA (2013).

³⁵⁵ 249 U.S. 204 (1919).

³⁵⁶ *Id.* at 208 (1919); STONE, *supra* note 49, at 195.

³⁵⁷ STONE, *supra* note 49, at 195.

³⁵⁸ *Frohwerk*, 249 U.S. at 205, 208; see also STONE, *supra* note 49, at 195.

³⁵⁹ *Frohwerk*, 249 U.S. at 208; *id.* at 210 (discussing *Schenck*).

proceeding in the United States.”³⁶⁰ Again, for a unanimous court, Holmes upheld the convictions.³⁶¹

Abrams v. United States represents the most important of these four opinions; it shows why First Amendment jurisprudence was reversed in the next fifty years. The defendants were five Russian intellectuals who wrote a pamphlet encouraging Marxist policies and deriding Wilson and the War.³⁶² Abrams rented the rooms in which they worked.³⁶³ The convictions were upheld; however, this time, Justice Clarke was writing for a divided court.³⁶⁴ Holmes wrote a dissent in which Justice Brandies joined, arguing thusly:

But as against dangers peculiar to war . . . the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.³⁶⁵

Later, this dissent would prove instrumental in reversing the jurisprudence in these four cases (but not the cases themselves), and in placing First Amendment rights on the path to the constitutional pedestal achieved in *Brandenburg v. Ohio*.³⁶⁶

³⁶⁰ *Id.* at 213.

³⁶¹ *Id.* at 217.

³⁶² 250 U.S. 616, 617-18 (1919).

³⁶³ *Id.*

³⁶⁴ *Id.* at 616.

³⁶⁵ *Id.* at 628 (Holmes & Brandeis, JJ., dissenting.).

³⁶⁶ *See* 395 U.S. 444 (1969).

Schaefer upheld another set of Espionage Act convictions against German newspaper editors.³⁶⁷ Writing for the majority, Justice McKenna held:

The indictment is based on the Espionage Act . . . and *its restraints are not excessive nor ambiguous*. . . .

But simple as the law is, perilous to the country as disobedience to it was, offenders developed, and when it was exerted against them [offenders] challenged it to decision as a violation of the right of free speech assured by the Constitution of the United States. . . . That great ordinance of government and orderly liberty was invoked to justify the activities of anarchy or of the enemies of the United States, and *by a strange perversion of its precepts* it was adduced against itself.³⁶⁸

In a similar vein, *Pierce v. United States* upheld the convictions of four socialists who argued that the war was being perpetrated for profitmaking reasons.³⁶⁹ In both cases, Brandeis and Holmes joined in dissent.³⁷⁰

Thus, for anarchists, aliens, pacifists, and socialists, there was no refuge in the First Amendment or the Court. The only refuge was silence.

5. *The End of Wilson's War on Americans*

In 1920, the clamor for the repression of dissent was beginning to fade and the pendulum began to swing away from totalitarian-

³⁶⁷ See 251 U.S. 466 (1920).

³⁶⁸ *Id.* at 476-77 (footnote omitted) (emphasis added).

³⁶⁹ See 252 U.S. 239 (1920).

³⁷⁰ See *Pierce v. United States*, 252 U.S. 239, 253 (1920) (Brandeis & Holmes, JJ., dissenting); *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis & Holmes, JJ., dissenting).

ism toward respect for natural liberties. The first part of the counterattack on the Wilson Administration was a publication authored by, among others, a Harvard Law School professor and future Supreme Court Justice, Felix Frankfurter, meticulously documenting the abuses suffered under A. Mitchell Palmer's Justice Department.³⁷¹ That summer, in a second wave of liberty, judges began to enjoin the deportation of aliens because of political affiliation or ideology.³⁷² Congress repealed the Sedition Act on December 13, 1920, but never repealed the Espionage Act of 1917.³⁷³ Wilson—his wife acting in his stead—commuted and reduced the sentences for violations of the Acts before leaving office; however, he refused to pardon Debs or to reduce his sentence.³⁷⁴ President Harding eventually pardoned Debs, and President Coolidge ordered the release of the remaining political prisoners just before 1924.³⁷⁵ As a result of the experience of severe political repression in World War I, John Dewey, Chrystal Eastman, Roger Baldwin, and Walter Nelles founded the ACLU in 1920 to fight government oppression.³⁷⁶

C. THE FREEDOM OF SPEECH IN THE WORLD WAR II ERA

In the Depression Era, the freedom of speech was undergoing a renaissance. The Court was beginning to give due deference to the natural supremacy of the individual right, rather than to the political convenience of the state. In some famous dissents, Justices Holmes and Brandeis were still lobbying brazen attacks at the insti-

³⁷¹ See generally R.G. BROWN ET AL., *TO THE AMERICAN PEOPLE: REPORT UPON THE ILLEGAL PRACTICES OF THE UNITED STATES DEPARTMENT OF JUSTICE* (1920).

³⁷² STONE, *supra* note 49, at 225.

³⁷³ *Id.* at 229.

³⁷⁴ *Id.* at 231.

³⁷⁵ *Id.* at 231-32.

³⁷⁶ *Id.* at 230; *American Civil Liberties Union*, U.S.LEGAL.COM (visited March 18, 2014), <http://associations.uslegal.com/american-civil-liberties-union/>.

tutionalization of opinion prosecution.³⁷⁷ Members of the Court were moving toward John Stuart Mill's vision on free speech: "If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."³⁷⁸ When the terror of fascism began to spread across Europe through Hitler and Mussolini, however, the Court and other branches of government would fall far short in endeavoring to improve protection for natural liberty in the United States, regressing into permitting unnatural and unlawful persecution of aliens, citizens, and dissidents.

This section briefly discusses the statutory authority for free speech suppression of radicals, the Smith Act. Then, it delves into its application in the criminal trials of William Pelley and other radicals in the Great Sedition Trial of 1944.

1. *The Smith Act*

While France was losing on its Western front in May 1940, FDR wasted no time blaming a "treacherous . . . fifth column," a term that refers to subversive, underground militants within a society,

³⁷⁷ See, e.g., *Whitney v. California*, 274 U.S. 357, 372 (1927) (Holmes & Brandeis, JJ., dissenting).

³⁷⁸ JOHN STUART MILL, *ON LIBERTY*, ch. II, para. 1, at 35 (2d ed. 1863) ("On the Liberty of Thought and Discussion"). Mill goes on to describe the utilitarian view of the evils of suppressing that one opinion:

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error. . . . We can never be sure that the opinion we are endeavouring to stifle is a false opinion; and if we were sure, stifling it would be an evil still.

Id. paras. 1-2, at 35-36; see also STONE, *supra* note 49, at 238 (discussing the language in the 1940 case *Cantwell v. Connecticut*, which reflects a much more tolerant attitude).

for the failure of the French military.³⁷⁹ In 1940, Congress passed the Alien Registration Act, or Smith Act named for its author, Rep. Howard W. Smith (D-VA).³⁸⁰ The Smith Act was a modern Alien and Sedition Acts, criminalizing a broad spectrum of constitutionally protected expressive political behavior in Title I, and expediting deportation proceedings for alien thought criminals.

Title I is the portion of the Act which reinstated the sedition crime of the World War I era, “[i]n practical effect, this was [a] [more restrictive version of the 1918 Sedition Act, akin to a version of an amended] sedition act Attorney General Palmer had failed to persuade Congress to pass in 1920.”³⁸¹ The act made criminal

Section 1. . . . [while] inten[ding] . . . to interfere with, impair, or *influence the loyalty, morale, or discipline of the . . . forces of the United States* – (1) to advise, counsel, urge, or in any manner *cause . . . disloyalty . . .* by any member of the military . . . ; or, (2) to *distribute any written or printed matter* which advises, counsels, or urges . . . disloyalty . . . by any member of the military . . . of the United States.

Section 2. . . . (1) to knowingly . . . advocate . . . or teach the duty, necessity, or desirability or propriety of overthrowing or destroying any government in the United States by force. . . . , (2) . . . to print, publish, *edit*, issue, circulate, sell, distribute, or publicly display any written or printed matter . . . [advocating the same], (3) to organize or help organ-

³⁷⁹ Address Delivered by President Roosevelt to the Congress, May 16, 1940, *available at* <https://www.mtholyoke.edu/acad/intrel/WorldWar2/fdr16.htm>; STONE, *supra* note 49, at 251; *see also* Remarks of Rep. Clifton A. Woodrum (D-VA), Rep. John Taber (R-NY), and Rep. Robert Rich (R-PA), 86 CONG. REC. 9019-21 (1940) (discussing approving these “so-called emergency defense bills”).

³⁸⁰ H.R. 5138, 86 CONG. REC. 9029-31, 9036 (1940) (codified at 18 U.S.C. § 2385) (introducing and passing the compromise Smith Act).

³⁸¹ STONE, *supra* note 49, at 251.

ize any society, group, or Assembly . . . [advocating the same].³⁸²

The act passed the House in a vote of 382-to-4.³⁸³ As one year vote, Rep. Hatton Sumners (D-TX), keenly observed, "We are coming under the influence of war psychology, or something very closely akin to it."³⁸⁴ FDR signed the act into law, expressly rejecting the notion that it was "an improper encroachment on civil liberties."³⁸⁵ The FBI was again in the process of dragnetting the citizenry and lawful resident aliens, and the Court while picking off particularly odious state laws showed no stomach for challenging FDR on national security law.³⁸⁶

2. *Pelley and the Great Sedition Trial*

During the mid-thirties, as the Nazi specter rose in Europe, there was considerable oppression of dissident viewpoints in the United States. This period is known as the "Brown Scare."³⁸⁷ FDR was under tremendous pressure to persecute Americans who were perceived as Communist and Nazi sympathizers and seditionists.³⁸⁸ By 1939, FDR was putting "constant pressure" on his then-Attorney General Frank Murphy to indict disloyal elements.³⁸⁹ In 1941, FDR appointed Frank Murphy to the Supreme Court and Frank Biddle as Attorney General. In his seminal work on the freedom of speech during war, *Perilous Times: Free Speech in Wartime*, upon which

³⁸² The Smith Act, 54 STAT. 670, 670-71 (1940) (emphasis added).

³⁸³ 86 CONG. REC. 9036 (1940).

³⁸⁴ Remarks of Rep. Hatton Sumners (D-TX), 86 CONG. REC. 9037 (1940).

³⁸⁵ STONE, *supra* note 49, at 252 (quoting FRANK J. DONNER, *THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM* 61 (1980)).

³⁸⁶ See MAXIMILIAN ST.-GEORGE & LAWRENCE DENNIS, *A TRIAL ON TRIAL: THE GREAT SEDITION TRIAL OF 1944*, at 20 (National Civil Rights Committee, 1st ed. 1946).

³⁸⁷ STONE, *supra* note 49, 252.

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 253.

much of the present work relies, the eminent Professor Geoffrey R. Stone focuses on two important cases under Biddle's term as Attorney General. This work will also address those two cases: the Pelley Trial and the Great Sedition Trial, albeit for different reasons than Professor Stone does.

The Pelley Trial was the prosecution of the "American Hitler."³⁹⁰ William D. Pelley was an American social leader, preacher, editorialist, publisher, and Nazi.³⁹¹ Pelley was a thorn in Roosevelt's political side since 1938, and FDR sought to prosecute him twice before the Smith Act was even passed.³⁹² In the wake of Pearl Harbor, FDR possessed sufficient political capital and the legislative backing through the Espionage and Smith Acts to do it. Charging Pelley with violations of those acts for statements he made between December 1941 and February 1942 in his circular, *The Guardian*, FDR's Justice Department secured a conviction that was appealed to the Seventh Circuit.³⁹³

The government needed to establish as a matter of fact that Pelley's statements were false.³⁹⁴ There are two issues with that: first, not all of them were false; second, what about *opinion* statements? Pelley was convicted of violating the Smith Act by saying that the American fleet suffered losses in Pearl Harbor that crippled the Pacific fleet and that our foreign policy before the War had caused Japan's attack. Today, that statement is known to be indisputably true. The Seventh Circuit's opinion, in discussing the element of falsity on appeal, said

³⁹⁰ *Id.* at 258.

³⁹¹ *Id.* at 258-59.

³⁹² *Id.* at 263.

³⁹³ See *United States v. Pelley*, 132 F.2d 170 (7th Cir. 1942).

³⁹⁴ *Id.* at 176 ("The Government on the trial offered testimony to establish the falsity of the published statements—which fact was sine qua non to the existence of the offense.").

[O]ne who broadcasts falsely, as verities, misstatements of the country's continued failure in battle, asserts that it is destitute of defenses, is bankrupt, that it has prejudiced and incompetent leadership, weak and defecting allies, disunity in allied nations and in the United States itself, and extols the virtues of the enemies cannot successfully challenge the verdict of a jury which finds him guilty of a crime.³⁹⁵

The court relied on these "misstatements of the country's continued failure in battle" in sustaining Pelley's conviction, including Pelley's claims that the losses at Pearl Harbor were much greater than the FDR administration was reporting. Posterity would give significant academic credit to Pelley's factual claims,³⁹⁶ leaving only his opinion claims.

Eventually, the Supreme Court would clarify that media opinion statements—which can never be true or false as they are entirely subjective—are not actionable unless they are "provable as false."³⁹⁷ Further, "statements that cannot reasonably be interpreted as stating actual facts about an individual are protected."³⁹⁸ There is no question that in 1940s America, Pelley's opinions were considered anathema socially and politically, but as John Stuart Mill advocated, there should be no law silencing the natural right to expressing opinion because "[w]e can never be sure that the opinion we are endeavoring to stifle is a false opinion; and if we were sure, stifling it would be an evil still."³⁹⁹ Pelley intermixed truth and opinion,

³⁹⁵ *Id.* at 177.

³⁹⁶ See generally EDWARD S. MILLER, *BANKRUPTING THE ENEMY: THE U.S. FINANCIAL SIEGE OF JAPAN BEFORE PEARL HARBOR* (2007); STONE, *supra* note 49, at 268-69.

³⁹⁷ *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 2 (1990) (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)).

³⁹⁸ *Id.* (citing *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6 (1970)).

³⁹⁹ MILL, *supra* note 378, ch. II, para. 1-2, at *35-36.

which must be tolerated in a society that is based on natural rights, no matter how unpopular.

The Supreme Court denied *certiorari* on a few occasions, and Pelley served ten years in federal prison until he was conditionally paroled in 1952.⁴⁰⁰ The condition was that he not engage in “political activities” for the balance of his life, a condition truly alien to contemporary ears.⁴⁰¹

The Great Sedition Trial of 1944 was one of the most redeeming moments in First Amendment law during this era. This is not because of the results of the proceedings, but because it played out as a “Department of Justice experiment in imitation of a Moscow political propaganda trial,”⁴⁰² and blew up in the government’s face so badly that the Justice Department backed far off of political prosecutions until the Second Red Scare in the 1950s.

Attorney General Biddle announced that twenty defendants who had “nothing in common [in terms of concert of action, timing, or geography] except a shared hatred of Jews, communism, and Roosevelt,” were to be indicted under the Smith Act for “conspir[ing] to undermine the morale of the armed forces.”⁴⁰³ In the words of a defense attorney and a defendant writing a book on the topic in 1946:

[T]he Trial was conceived and staged as a political instrument of propaganda and intimidation of certain ideas and tendencies which are spoken of as isolationism, anti-communism, and anti-Semitism . . . [A]t no time was the Department of Justice or the F.B.I. worried over the menace

⁴⁰⁰ *Johnson v. U.S.*, 318 U.S. 801 (1943); STONE, *supra* note 49, at 266.

⁴⁰¹ STONE, *supra* note 49, at 266 (citation omitted).

⁴⁰² ST.-GEORGE & DENNIS, *supra* note 385, at 16.

⁴⁰³ STONE, *supra* note 49, at 273.

to the public safety or the war effort created by these thirty-odd defendants.⁴⁰⁴

These defendants were so unconnected that their viewpoints were often contradictory and mutually exclusive, holding one, two, or none of the descriptors cited above.⁴⁰⁵ Somehow, though, the government intended to prove conspiracy, which requires the agreement of all members to a *common* criminal purpose or plan, plus an overt act in furtherance of the agreement.

Over the course of the trial, the defendants began treating it as a farce and wearing Halloween masks in the courtroom at times.⁴⁰⁶ After the trial dragged on for seven-and-a-half months, with the prosecution halfway through its case, the matter was disposed.⁴⁰⁷ The original judge, Edward C. Eicher, died from the stress of the trial and the next federal judge to whom the case was referred declared a mistrial.⁴⁰⁸ The *New York Times* wrote, "Sedition Trial's Wrangles Come to an Abrupt Close," with the author describing how there were "no lamentations from any source" over the dismissal and complaining over the waste of \$60,000 in court costs.⁴⁰⁹

The *Washington Post* lambasted the court, writing that the trial would "stand as a black mark against American justice for years to come," and called for the government officials "responsible for this travesty" that is "undermining confidence in American justice, to "end this sorry spectacle."⁴¹⁰ It withdrew its reporter.⁴¹¹ Summing

⁴⁰⁴ ST.-GEORGE & DENNIS, *supra* note 385, at 35-44.

⁴⁰⁵ *Id.* at 34-45.

⁴⁰⁶ STONE, *supra* note 49, at 274.

⁴⁰⁷ ST.-GEORGE & DENNIS, *supra* note 385, at 16.

⁴⁰⁸ *Id.* at 16; *Sedition Trial Ends on Mistrial Order*, N.Y. TIMES (Dec. 8, 1944).

⁴⁰⁹ Fredrick R. Barkely, *Sedition Trial's Wrangles Come to an Abrupt Close*, N.Y. TIMES (Dec. 10, 1944).

⁴¹⁰ *Mass Trial*, WASH. POST. (July 16, 1944), reprinted in ST. GEORGE & DENNIS, *supra* note 385, at 431; *Courtroom Farce*, WASH. POST (July 28, 1944), reprinted in ST. GEORGE & DENNIS, *supra* note 385, at 432-33; RICHARD W. STEELE, *FREE SPEECH IN THE GOOD WAR* 224 (St. Martin's Press, 1st ed. 1999) (quoting the WASH. POST).

up public sentiment nicely, the *Saturday Evening Post* hailed “LET THIS BE OUR LAST MASS TRIAL.”⁴¹²

Totally baseless and political *criminal* prosecutions seemed to become utterly disfavored in the United States after the Great Sedition Trial. Yet, there was still the possibility of throwing a victim to the wolves, like Pelley, for opinion statements because a slightly less strict form of the sedition part of the Smith Act remains enacted in the United States Code to this day. Under the ominous title “Advocating overthrow of the Government,” it permits up to twenty years in prison for publishing or orally advocating—not conspiring, merely advocating—overthrow of the government by force.⁴¹³ During the Cold War, the Smith Act would be used to send a few more Paschal lambs to the prison.

Title I of the Smith Act and the Espionage Act of 1917 remain in the United States Code today, changing form over the years, and serving initially after World War II as the statutory basis for the congressional investigations of the Second Red Scare. The impending Cold War would impede the recognition of liberty after World War II, paving the way for oppression during the Second Red Scare.

D. THE EARLY COLD WAR AND SECOND RED SCARE

President Truman’s legal infrastructure for abusing executive power in criminal prosecutions was already in place, left over from FDR’s war on speech. The major criminal prosecutions under the Smith Act began in 1949.

⁴¹¹ ST.-GEORGE & DENNIS, *supra* note 385, at 433.

⁴¹² *Id.* at 403 (quoting *Let This Be Our Last Mass Trial*, SAT. EVENING POST (Jan. 6, 1945)).

⁴¹³ Smith Act, ch. 439, 54 Stat. 670 (1940) (codified at 18 U.S.C.A. § 2385 (2012)).

1. *Cold War Tension and the Great Communist Trial of 1949*

"As early as 1946 the FBI and the Internal Security Section of the Justice Department's Criminal Division had begun assembling a case against the [Communist] [P]arty."⁴¹⁴ By 1948, that investigation formed the basis for Attorney General Clark's order to obtain a grand jury indictment of the CPUSA leaders in 1948.⁴¹⁵ Clark enlisted the U.S. Attorney for the Southern District of New York, John F. X. McGohey, to prosecute the case, despite warnings from his own attorneys that "the government would 'be faced with a difficult task in seeking to prove beyond a reasonable doubt . . . that the Communist Party advocates resolution by violence.'"⁴¹⁶

On July 20, 1948, a federal grand jury in the Southern District of New York "handed up true bills" of indictment against the entire 12-person board of the CPUSA for violations of the Smith Act.⁴¹⁷ The popular appellation for the case, the Foley Square Trial, came about because the case was held in Manhattan at the federal court house on Foley Square.

The prosecution's theory proving that the defendants advocated the violent overthrow of the government in contravention of the Smith Act asserted that before 1935, the CPUSA was devoted to the violent overthrow of the government per Leninist Marxism, eschewed that during World War II because of the Nazi threat facing the mother country, and then returned to their former violent revo-

⁴¹⁴ Michal R. Belknap, *Cold War in the Courtroom: The Foley Square Communist Trial*, in *AMERICAN POLITICAL TRIALS* 210 (Michal R. Belknap ed., Rev. Ed. 1994).

⁴¹⁵ *Id.* at 210-11.

⁴¹⁶ *Id.* at 211.

⁴¹⁷ *Id.* at 211; *Indicted Reds Get Wallace Support: Communists are Held Victims of Truman-Bipartisan Move to Remain in Power*, N.Y. TIMES (July 22, 1948), <http://query.nytimes.com/mem/archive/pdf?res=F20615F73F59157A93C0AB178CD85F4C8485F9>.

lutionary tendencies in the postwar peacetime.⁴¹⁸ To prove it, they would introduce Communist “propaganda” into evidence:

[T]he prosecution relied mainly on articles, pamphlets, and books—especially on Marx and Engels’s [sic] *The Communist Manifesto* (1848), Lenin’s *State and Revolution* (1917), Stalin’s *Fundamentals of Leninism* (1929) and *Program of the Communist International* (1928). Much of this literary evidence was quite dated, and the government could offer no proof that American Communists were about to translate into action any of the ideas it contained. Nevertheless, literature was the heart of the prosecution’s case. Government lawyers regarded the testimony of witnesses as only corroborative of their printed evidence and put them on the stand primarily to introduce and interpret Communist literature and explain how it manifested itself in the activities of the CPUSA.⁴¹⁹

As Michael Belknap noted in *American Political Trials*, “The prosecution proceeded as if the party itself were the defendant, however. Only about ten percent of its evidence tended in any way to establish the complicity of the accused in the alleged conspiracy. The rest served only to build a case against the CPUSA.”⁴²⁰ The trial was political theatre and propaganda for the government: An opportunity to showcase and bash communism.

When the jurors went to deliberate, Judge Harold Medina’s instructions to them rejected any use of the First Amendment’s “clear and present danger” test: “if the defendants had violated the Smith Act, ‘as a matter of law,’ they had created ‘sufficient danger of a substantive evil that Congress had a right to prevent to justify the

⁴¹⁸ Belknap, *supra* note 413, at 214.

⁴¹⁹ *Id.* at 214-15.

⁴²⁰ *Id.* at 214.

application of the statute under the First Amendment.”⁴²¹ Of course, the jury handed back convictions in a mere seven-and-a-half hours on the narrow question of whether they had violated the Smith Act.⁴²²

The defendants appealed on First Amendment grounds, charging that the Smith Act violated the Bill of Rights, and that Medina committed reversible error by not instructing the jury on the “clear and present danger” test.⁴²³ The Supreme Court had been favorably applying the “clear and present danger” test before this case,⁴²⁴ so it seemed that Medina’s error might result in a reversal.

Then, the day following the conclusion of oral arguments, North Korea invaded South Korea, which “obviously shaped [the court’s] treatment of the free speech issue.”⁴²⁵ Because of the Korean conflict, the character of the case changed from a peacetime First Amendment case to a wartime subversion case. Accordingly, writing for the Second Circuit Court of Appeals, Chief Judge and famous jurist Learned Hand affirmed the convictions under the Smith Act, as well as the Act’s constitutionality.⁴²⁶ In order to accomplish this feat, Hand reformulated the “clear and present danger” rule to adopt a balancing test for First Amendment constitutionality:

The phrase, ‘clear and present danger,’ has come to be used as a shorthand statement of those among such mixed or compounded utterances which the Amendment does not protect. . . . It is a way to describe a penumbra of occasions,

⁴²¹ *Id.* at 221.

⁴²² *Id.*

⁴²³ *United States v. Dennis (Dennis I)*, 183 F.2d 201, 206-207 (2d Cir. 1950), *aff’d* 341 U.S. 494 (1951).

⁴²⁴ *See, e.g., American Communications Ass’n, C.I.O. v. Douds*, 339 U.S. 382, 394-400 (1950) (discussing applications of and giving dicta about the clear and present danger test); *Dennis I*, 183 F.2d at 207-212 (discussing applications of and giving dicta about the clear and present danger test).

⁴²⁵ *Belknap*, *supra* note 413, at 222, 223.

⁴²⁶ *Dennis I*, 183 F.2d at 234.

even the outskirts of which are indefinable, but within which, as is so often the case, the courts must find their way as they can. In each case they must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. We have purposely substituted 'improbability' for 'remoteness,' because that must be the right interpretation.⁴²⁷

Hand's reformulation converted the constitutional bias in favor of the freedom of speech, that Congress shall make *no* law abridging it, and replaced it with a balancing test of government and personal interests. Under that formulation, reaching the result of upholding the convictions was much easier.

As to the first matter, the constitutionality of the Smith Act under the First Amendment, the court held that "the Smith Act is constitutional, so limited."⁴²⁸ However, it took some mental gymnastics to reach this conclusion. The defendants argued that the statute is so overbroad that it proscribes not only words inciting imminent lawless action, but even innocuous speech. As Judge Hand stated in the majority opinion, "[t]he words of the Act are unconditional and forbid advocacy or teaching of such a violent overthrow at any time and by anyone, weak or strong; literally, they make criminal the fulminations of a half crazy zealot on a soap box, calling for an immediate march upon Washington."⁴²⁹ Clearly, this act went well beyond the scope of the "clear and present danger" test and the defense believed that this should be resolved through Congress re-writing the statute after the Court strikes it down.

Instead, the court rewrote the statute from the bench, inferring that the statute was only meant to reach to the extent permitted by the First Amendment, similar to the Second War Powers Act of 1941

⁴²⁷ *Id.* at 212.

⁴²⁸ *Id.* at 214.

⁴²⁹ *Id.*

which permitted property takings to the extent permitted by the Fifth Amendment. The problem is, unlike the War Powers Act, the supposedly curative language was not even in the text of the statute. The court, however, considered this intent on behalf of Congress self-evident: "We have no such problem here, because there can be no doubt as to the intent; Congress has explicitly declared that it wished the words to govern all cases which they constitutionally could."⁴³⁰ That is a particularly poor inference in light of the history of the Smith Act itself, and Congress' intentions in previous wartime abridgments of the freedom of speech. Moreover, by upholding the convictions, the court had rendered meaningless the constitutional test: If these defendants were a clear and present danger to national security, it requires a vibrant imagination to envision what wouldn't be.

Judge Medina's jury instructions were similarly upheld.⁴³¹ Although he refused to instruct them to make the actual determination of the clear "presence" or imminence of the danger, and the "degree of probability that the utterance will bring about the evil is a question of fact" within the province of a jury, and the "clear and present danger" test as Judge Hand formulated it is a question of fact, not a question of law, the actual balancing of interests was something within the court's province rather than the jury's.⁴³² Thus, "[f]or these reasons the judge appears to us to have been right, when in the case at bar he took upon himself the duty of declaring that the defendants were guilty."⁴³³ The court then added the qualifier for review, "if the jury found that they organized and supported the Party for the purpose, among others, of spreading the doctrine of violent revolution, that purpose to be realized as soon as it

⁴³⁰ *Id.*

⁴³¹ *Id.* at 215-16.

⁴³² *Id.*

⁴³³ *Id.* at 216.

was feasible.”⁴³⁴ That question bears a striking similarity to the question of how imminently or presently the defendants might realize the desired lawless end. Therefore, what is seen here is an instance of question begging: The judge did not err in taking the question of presence or imminence from the jury because his determination was acceptable since the jury later made a finding regarding the feasibility of accomplishing the purpose.

The defendants appealed and the Supreme Court granted “only a limited writ of certiorari.”⁴³⁵ The Court heard oral argument in *Dennis v. United States* on December 4, 1950. Nine days before the Supreme Court heard oral argument, on November 25, the Eighth Army began the longest, most humiliating retreat in U.S. military history due to massive Chinese intervention in the Korean War.⁴³⁶ Just as the exigencies of war played out in the Second Circuit, the same considerations would taint the Supreme Court, which waited to decide the case until June 4, 1951, when it became more obvious that the U.N. and Communist forces had deadlocked on the 38th Parallel.

The Court began its analysis by drawing a false dichotomy: “the obvious purpose of the statute is to protect existing Government, not from change by peaceable, lawful and constitutional means, but from change by violence, revolution and terrorism.”⁴³⁷ The statute stands for peace, law, and the constitutional order, while that which it stands against are the forces of violent, communist revolution and totalitarian terror. The false dichotomy is a fallacy wherein the proposition forces a binary choice when there are in reality many middle grounds and possibilities (especially relevant here, given the breadth of the statute). Accordingly, the Court broadly “reject[ed] any principle of governmental helplessness in the face of prepara-

⁴³⁴ *Id.*

⁴³⁵ Belknap, *supra* note 413, at 223.

⁴³⁶ *Dennis v. United States (Dennis II)*, 341 U.S. 494 (1951).

⁴³⁷ *Dennis II*, 341 U.S. at 501.

tion for revolution, which principle, carried to its logical conclusion, must lead to anarchy.”⁴³⁸

Chief Justice Vinson’s opinion is one of the more fantastic examples of tortured reasoning in American jurisprudence. He begins by attempting to parse distinctions that delineate permissible speech from what the Smith Act covers—an admittedly “difficult” task, “the very language of the Smith Act negates the interpretation which petitioners would have us impose on that Act. It is directed at advocacy, not discussion.”⁴³⁹ Then, he goes on to discuss the purposes of the First Amendment, which, for his argument to hold water, should line up with the distinction he just drew between advocacy and discussion: “The basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies. It is for this reason that this Court has recognized the inherent value of free discourse.”⁴⁴⁰

The underlying premise of the First Amendment is an *adversarial* marketplace of ideas, where ideas *compete* for success. Speech can rebut speech. Propaganda is advocacy and discussion. It is impossible for that distinction to hold up over time. How can people discuss two opposing points of view in any form of competing ideas, or debate over the merits of opposite ideas without advocating for the merits of one perspective?

The majority adopted Judge Hand’s formulation of the “clear and present danger” balancing test outright.⁴⁴¹ And applying that test, they reasoned that the test “cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited,” moreover, “[i]f Government is aware that a group aiming at its overthrow

⁴³⁸ *Id.*

⁴³⁹ *Id.* at 502.

⁴⁴⁰ *Id.* at 503.

⁴⁴¹ *Id.* at 510; Belknap, *supra* note 413, at 223-24.

is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required.”⁴⁴²

2. *The End of the Second Red Scare: The Warren Court*

During the presidency of Dwight D. Eisenhower, the Court began to attack the legal bulwarks of the Second Red Scare as the exigencies of the Korean War began to fade. In 1953, Earl Warren succeeded Fred M. Vinson as Chief Justice, bringing a new era of liberalism to the court, the same year as the Korean Armistice and Stalin’s death. However, it took until 1956 for the Red Scare to wind down and in 1957, the Court reigned in both Congress and the President in two successive decisions: *Yates v. United States* and *Watkins v. United States*.

Yates was a landmark Supreme Court opinion at the time.⁴⁴³ It served as the most clear marking post that war hysteria would no longer be a constitutional basis to impose on the rights of political minorities. The *Yates* defendants were convicted in the Southern District of California under the Smith Act as second-tier communist defendants, following the *Dennis* decision.⁴⁴⁴

In *Yates*, the Supreme Court held that convictions under the Smith Act require “advocacy of action to that end” of forcible overthrow of the government, not merely advocacy of forcible overthrow of the government as an abstract doctrine.⁴⁴⁵ Indeed, to accomplish this doctrinal end, the Court completely reshaped the meaning of Chief Justice Vinson’s distinction between advocacy and discussion in *Dennis*:

⁴⁴² *Dennis II*, 341 U.S. at 509.

⁴⁴³ *Yates v. United States*, 354 U.S. 298 (1957).

⁴⁴⁴ *Id.* at 301-302 & n.1.

⁴⁴⁵ *Id.* at 320.

It is true that at one point in the late Chief Justice's opinion it is stated that the Smith Act 'is directed at advocacy, not discussion,' but it is clear that the reference was to advocacy of action, not ideas, for in the very next sentence the opinion emphasizes that the jury was properly instructed that there could be no conviction for 'advocacy in the realm of ideas. . . .'

In failing to distinguish between advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end, the District Court appears to have been led astray by the holding in *Dennis* that advocacy of violent action to be taken at some future time was enough. It seems to have considered that, since 'inciting' speech is usually thought of as something calculated to induce immediate action, and since *Dennis* held advocacy of action for future overthrow sufficient, this meant that advocacy, irrespective of its tendency to generate action, is punishable, provided only that it is uttered with a specific intent to accomplish overthrow. In other words, the District Court apparently thought that *Dennis* obliterated the traditional dividing line between advocacy of abstract doctrine and advocacy of action.⁴⁴⁶

To be entirely fair to the district court, despite the Court's identification of apparently qualifying language, the former Chief Justice very clearly obliterated that distinction in *Dennis*, which *Yates* thankfully rehabilitated. The *Yates* decision is more properly read as overruling the *Dennis* case.

That same day, the Supreme Court handed down a companion case, *Watkins v. United States*.⁴⁴⁷ Watkins was a career labor union leader and organizer who was subpoenaed by HUAC to testify.⁴⁴⁸

⁴⁴⁶ *Id.* at 320.

⁴⁴⁷ 354 U.S. 178 (1957).

⁴⁴⁸ *Id.* at 182-83.

When it came time to name names for the Committee, he refused to do so and was held in criminal contempt of Congress.⁴⁴⁹

Writing for the majority, Chief Justice Warren noted that the text of the statute for contempt of Congress contains unusual narrowing language regarding how pertinent the question asked by a congressman is to the inquiry at bar: "Part of the standard of criminality, therefore, is the pertinency of the questions propounded to the witness."⁴⁵⁰ Warren then went on to attack the pertinence of naming names to the inquiry of Communist activity, noting "the authorizing resolution, the remarks of the chairman or members of the committee, or even the nature of the proceedings themselves, might sometimes make the topic clear. This case demonstrates, however, that these sources often leave the matter in grave doubt."⁴⁵¹ The majority concluded that Watkins "was thus not accorded a fair opportunity to determine whether he was within his rights in refusing to answer, and his conviction is necessarily invalid under the Due Process Clause of the Fifth Amendment."⁴⁵²

The *Yates* and *Watkins* decisions were twin stabs at the heart of the Second Red Scare legal infrastructure. In *Yates*, the Court's reading of the Smith Act was "narrowed to the point of making it virtually unenforceable."⁴⁵³ It "took the 'teeth' out of the Smith Act," and "[a]fter the *Yates* case, there were [almost] no more prosecutions carried out to enforce the Smith Act."⁴⁵⁴ The *Watkins* holding had far-reaching implications for reform to the congressional investigatory system, "plac[ing] [a] fundamental restriction[] on a Congressional investigatory power that in recent years has been asserted as

⁴⁴⁹ *Id.* at 181.

⁴⁵⁰ *Id.* at 208.

⁴⁵¹ *Id.* at 209.

⁴⁵² *Id.* at 215.

⁴⁵³ JOHN J. PATRICK ET AL., *THE OXFORD GUIDE TO THE UNITED STATES GOVERNMENT* 723 (2001).

⁴⁵⁴ *Id.*

all but limitless.”⁴⁵⁵ It permanently damaged the power of committees like HUAC and the McCarthy Committee to harangue individuals for public spectacle and political profit.

In 1959, however, the Vietnam War would become the focus of the American public. In the Vietnam-era case *Scales v. United States*,⁴⁵⁶ the Court would leave the door open for future oppression.⁴⁵⁷ In *Scales*, the Court upheld the 1958 re-conviction of Junius Scales of the CPUSA for violating the (mere) membership provision of the Smith Act on First and Fifth Amendment grounds. Broadly assaulting the freedom of association, the Court held thusly:

Little remains to be said concerning the claim that the statute infringes First Amendment freedoms. It was settled in *Dennis* that the advocacy with which we are here concerned is not constitutionally protected speech, and it was further established that a combination to promote such advocacy, albeit under the aegis of what purports to be a political party, is not such association as is protected by the First Amendment. We can discern no reason why membership, when it constitutes a purposeful form of complicity in a group engaging in this same forbidden advocacy, should receive any greater degree of protection from the guarantees of that Amendment.⁴⁵⁸

President John F. Kennedy commuted the sentence of Junius Scales, “the only American ever imprisoned under that clause of the Smith Act prohibiting membership” in a Communist organization, in December 1962.⁴⁵⁹ The gambit gained him favor in East Coast

⁴⁵⁵ *Inquiry Reform Seen Inevitable*, N.Y. TIMES (June 19, 1957).

⁴⁵⁶ 367 U.S. 203 (1961).

⁴⁵⁷ See *United States v. O'Brien*, 391 U.S. 367 (1968).

⁴⁵⁸ *Scales*, 367 U.S. at 228-29; see also *id.* at 224-30 (discussing the First and Fifth Amendment implications).

⁴⁵⁹ *Clemency for Scales*, N.Y. TIMES (Dec. 28, 1962).

political circles, with the *New York Times* “feel[ing] that the President acted with courage and wisdom, as well as in the best American tradition in granting it.”⁴⁶⁰ Conversely, the Court’s decision was assailed the by *New York Times* editorial board when it was issued in June: “The sustaining of the Smith Act’s membership clause, and the setting in motion of the ponderous Internal Security Act, can only serve again to divert public attention to the virtually non-existent internal Communist threat. The real Communist challenge is from abroad.”⁴⁶¹ Thus, in the background to the new liberal attitude of the 1960s, there was mounting tension regarding legal repression in the escalating Vietnam War.

E. THE NIXON YEARS

1. *Brandenburg v. Ohio*

Immediately after winning the 1968 presidential election, Richard M. Nixon promised to bring the Vietnam War to an honorable end. Taking the zeitgeist of the Nixon antiwar movement, the Court decided *Brandenburg v. Ohio* in 1969, *per curiam*, overruling *Whitney v. California* and casting considerable doubt on the *Dennis* line of cases.⁴⁶² It held that for speech not to be protected by the First Amendment, it must be “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁴⁶³

Clarence Brandenburg was convicted under Ohio’s criminal syndicalism statute, Ohio’s two-for-one sedition and criminal syndicate act.⁴⁶⁴ Brandenburg was a local leader of the Ku Klux Klan in

⁴⁶⁰ *Id.*

⁴⁶¹ *The Court on Communism*, N.Y. TIMES (June 7, 1961).

⁴⁶² *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*).

⁴⁶³ *Id.* at 447.

⁴⁶⁴ *Id.* at 444-45.

Hamilton County.⁴⁶⁵ At a meeting of the Klan, he gave the following speech:

'This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken.

'We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.'⁴⁶⁶

While certainly not an invitation that I would care to accept, it is a far cry from dredging up a massive popular revolt. The Court handled this issue by overruling *Whitney*, which eliminated the "clear and present danger" test and its rival, the "bad tendency" test, from Supreme Court jurisprudence and streamlined First Amendment jurisprudence into the "imminent lawless action" test.⁴⁶⁷ Therefore, the court held, "Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained."⁴⁶⁸ The Court ruled that all innocuous speech is absolutely protected; and all speech is innocuous when there is time for more speech to resist or rebut it. The beginning of the Nixon years appeared as though there would

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at 446.

⁴⁶⁷ *Id.* at 447, 449.

⁴⁶⁸ *Id.* at 448.

be a shift towards a more liberalized state, but in reality it was a shift towards the secret police state.

2. *The Pentagon Papers*

On June 13, 1971, several newspapers, including *The New York Times* and the *Washington Post*, published highly damaging and embarrassing documents that were substantially at odds with the government's version of events in Vietnam. These came to be known as The Pentagon Papers. Although the Papers contained mostly common knowledge, they also contained key unknown-to-the-public aspects of the war.⁴⁶⁹ For example, the papers documented that advisors to President Kennedy had not merely advised South Vietnamese troops but rather actively engaged in direct military operations; that the Gulf of Tonkin Resolution had been rushed, even "rammed" through Congress under obviously false pretenses; and finally that, unbeknownst to the American people, American troops had knowingly dropped bombs on thousands of Vietnamese civilians.⁴⁷⁰

Quite possibly the "Edward Snowden" of his day, Daniel Ellsberg became in essence an American fugitive when the government revealed that he had been responsible for leaking the Pentagon Papers to the press. Ellsberg was a Harvard-educated bureaucrat who worked in the Department of Defense. Spending time in Vietnam, and then subsequently becoming instrumental in the compilation of the Pentagon Papers, Ellsberg increasingly gained an adverse prospective of the war in Vietnam.⁴⁷¹

⁴⁶⁹ DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* 408-14 (1989).

⁴⁷⁰ STONE, *supra* note 49, at 500 (citing SANFORD J. UNGAR, *THE PAPERS AND THE PAPERS: AN ACCOUNT OF THE LEGAL AND POLITICAL BATTLE OVER THE PENTAGON PAPERS* 32-34 (1972)).

⁴⁷¹ *Id.* at 502 (citing DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* 48-87 (2002)).

After learning that a friend had become employed by the *New York Times*, Ellsberg decided to take action and sent a redacted copy of the Papers to the newspaper. The threat of publication took the Nixon Administration by complete surprise, since the Department of Justice and the Attorney General had never heard of the "Pentagon Papers."

Things escalated quickly however, when the Justice Department filed a complaint with the federal district court in Manhattan seeking an injunction against the *New York Times* publishing the materials. Judge Murray Gurfein granted a temporary injunction against the *Times*, ruling that harm resulting from not publishing the article was far outweighed by the "irreparable harm that could be done to the interests of the United States government if [the documents were published and the government] should ultimately prevail [in the case]."⁴⁷²

In granting the government's request for an injunction, the Court, for the first time in the history of the United States, *prevented* a newspaper from publishing *truthful* information. This egregious move by Judge Gurfein has come to represent an abhorrent attack upon the freedom of the press and the First Amendment. The Constitution expresses no "right" to know what the government is up to, but it does guarantee the right of free speech and the right of the press to publish information to the public: even information damning to the government. The Framers "were committed to a very minimal 'watch dog government,' and saw rights as retained by the people to be safeguarded against infringement by government."⁴⁷³

After the injunction was granted, Ellsberg entered into the life of a fugitive.⁴⁷⁴

⁴⁷² United States v. N.Y. Times Co., 328 F. Supp. 324, 325 (S.D.N.Y. 1971).

⁴⁷³ Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271, 273 (1971).

⁴⁷⁴ See ELLSBERG, *supra* note 470, at 400, 401 (emphasis added).

After hearing additional arguments on a motion by the *Times* to reconsider, Judge Gurfein had a substantial change of heart and removed his injunction, ruling that the Espionage Act of 1917 was never intended to interfere with the right of a newspaper “to vindicate the right of the public to know” the truth.⁴⁷⁵ Yet, he stayed his vacation of his injunction, pending appeal.

Both this case and a companion case, dealing with an injunction the government sought and obtained upon the *Washington Post*, made their way to the Supreme Court in *New York Times Co. v. United States*.⁴⁷⁶ In a 6-to-3 decision, the Court rejected the validity of the injunctions upon the newspaper companies. Justice Hugo Black noted: “Every moment’s continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment.”⁴⁷⁷ The Court rejected the claim that national security is a logical ground for limiting the freedom of the press: “the word security is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”⁴⁷⁸ There can be no balance between the Constitution and civil liberties; there is only the bias of freedom over security via protection from the government.

What happened to the heroic whistleblower? Daniel Ellsworth voluntarily turned himself into federal officials in Boston on June 28, 1971. He was subsequently indicted under the Espionage Act of 1917. To the Nixon Justice Department, the Supreme Court’s decision to protect the press had no bearing on the vindication of Ellsberg; he had committed a crime against the government under the 1917 law.

⁴⁷⁵ STONE, *supra* note 49, at 508 (citing *United States v. New York Times Co.*, 328 F. Supp 324, 325 (S.D.N.Y. 1971)).

⁴⁷⁶ *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

⁴⁷⁷ *Id.* at 717 (Black, J., concurring) (“The first amendment protected the press so that it could bare the secrets of government and inform the people.”).

⁴⁷⁸ *Id.*

However, Nixon, wishing to discredit Ellsberg even further, ordered, authorized, or acquiesced in the use of federal agents to break into the office of Ellsberg's psychiatrist in September 1971.⁴⁷⁹ When Ellsberg's trial judge, district court Judge Matthew Byrne, received word of this, he dismissed all charges against Ellsberg because "the 'unprecedented' government misconduct offended the 'sense of justice' and 'incurably infected the prosecution of this case.'"⁴⁸⁰

F. POLITICAL PROSECUTIONS IN THE BUSH ERA

While the Warren Court made strong strides towards liberalizing First Amendment rights at the expense of the reach of national security law, even today the government can still suppress those who would reveal its secrets or those who would seemingly oppose the government's ideological purity. This section recounts two prosecutions from the Bush era that fit these models: the "insider trading" prosecution of former Qwest CEO, vice-Chairman-and-then-later-Chairman of the National Security Telecommunications Advisory Committee, Joseph P. Nacchio, and the refusal to permit Professor Tariq Ramadan to enter the United States to take up a teaching post at my *alma mater*, the University of Notre Dame.

Nacchio was indicted for insider trading and according to Scott Shane of the *New York Times*:

As part of his defense, Mr. Nacchio claimed that he had knowledge of top secret contracts with the N.S.A. and other government agencies that made the company's financial prospects brighter than was publicly known. Prosecutors denied the claims[, and objected to the defense].

⁴⁷⁹ *Trials: Practicing on Ellsberg*, TIME (May 7, 1973).

⁴⁸⁰ STONE, *supra* note 49, at 515 n.362.

. . . Mr. Nacchio was chairman of the National Security Telecommunications Advisory Committee, whose members included top executives of most of the major communications companies. Like nearly every chief executive in the industry, he had been granted a security clearance to work with the government on secret projects.

In the court papers, Mr. Nacchio's lawyers said he and James F. X. Payne, then Qwest's head of government business, spoke with N.S.A. officials about the agency's Groundbreaker project, in which the agency's non-secret information technology would be contracted to private companies.

At the same meeting, N.S.A. officials made an additional proposal, whose exact nature is not made clear in the censored documents.

'The court has prohibited Mr. Nacchio from eliciting testimony regarding what also occurred at that meeting,' one of the documents states. Another passage says: 'The court has also refused to allow Mr. Nacchio to demonstrate that the agency retaliated for this refusal by denying the Groundbreaker and perhaps other work to Qwest.'⁴⁸¹

Joe Nacchio's testimony goes into more detail. In the spring of 2000 and spanning into 2001, he met General Harry D. Rutledge, Jr., Manager of the National Communication Systems, and James F. X. Payne.⁴⁸² The two planned to have Qwest build fiber optic intranet

⁴⁸¹ Scott Shane, *Former Phone Chief Says Spy Agency Sought Surveillance Help Before 9/11*, N.Y. TIMES (Oct. 14, 2007), <http://www.nytimes.com/2007/10/14/business/14qwest.html?pagewanted=print&r=0>.

⁴⁸² Section 5 CIPA Submission on Behalf of Def. (Redacted), *United States v. Nacchio*, No. 05-CR-00545, 2006 WL 3292818, at *8 (D. Colo. Nov. 13, 2006).

facilities for overseas and domestic military installations.⁴⁸³ Joe Nacchio relied on those business opportunities in signing his company's SEC guidance filings and conducting his own business trades during 2000 and 2001.⁴⁸⁴

However, in February 2001, Nacchio refused to comply with a government demand to become part of a "potentially illegal surveillance program—and when he declined, [the NSA] punished the company by dropping a contract worth hundreds of millions of dollars."⁴⁸⁵ His colleagues in telecommunications and his new so-called friends in government tried to talk him into staying with the program. To this day, Nacchio is prohibited from saying what the NSA demanded of Qwest. But Joe Nacchio believed that he was being asked by the government to break federal law.

Thereafter, in the spring, Qwest's classified contracts dried up. The Bush Administration, through the SEC and the Justice Department, decided to discredit the dissenter and deter other CEOs from following suit. Like William Pelley of the Word War II era, Nacchio was maliciously prosecuted. The administration accused him of pumping and dumping his investors—trading based on material inside information because he didn't have any solid long-term investments on his books for Fiber optics business opportunities.⁴⁸⁶

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ Katherine Thompson, *Ex-Qwest CEO Claims Spy Effort Began Before 9/11*, NEWSER, (Oct.13, 2007, 9:34 AM), <http://www.newser.com/story/9419/ex-qwest-ceo-claims-spy-effort-began-before-911.html>; see also Shane, *supra* note 482.

⁴⁸⁶ "Nacchio was convicted of illegal insider trading in 2007 for selling \$52 million in Qwest stock in 2001 on the basis of nonpublic information about the Denver company's deteriorating finances. He has contended that he had a bright outlook on the company at the time of the stock sales." Andy Vuong, *Former Qwest CEO Joe Nacchio Completes his Prison Sentence*, DENVER POST (Sep. 21, 2013), <http://blogs.denverpost.com/techknowbytes/2013/09/21/former-qwest-ceo-joe-nacchio-completes-his-prison-sentence/11484/>.

Refusing to sacrifice the privacy of millions of clients landed Nacchio seventy months in prison.⁴⁸⁷ He was released on Sept. 21, 2013 and is writing a book about the terrors of justice.⁴⁸⁸

Nacchio was not alone in being persecuted—scholars, with all the trappings of the First Amendment attached to their work, were no safer than businessmen. Engaging in a “McCarthy-like attempt to keep prickly ideas out of the country,” the Bush State Department refused to give a Swiss citizen and anti-jihadist Islam scholar, Professor Tariq Ramdan, a visa whereby he could accept a teaching post at Notre Dame.⁴⁸⁹ The INS claimed that he had “used a ‘position of prominence within [a] country to endorse or espouse terrorist activity.’”⁴⁹⁰

In *American Academy of Religion v. Chertoff* (American Academy of Religion I), a federal court in the Southern District of New York heard Ramdan’s suit against the Department of Homeland Security and the State Department for his “continued exclusion . . . from the United States.”⁴⁹¹ Ramdan challenged both the statute under which his temporary visa was canceled (one of the many portions of the PATRIOT Act which pertains to aliens), and the validity of the government’s actions under the First Amendment.

Ramdan was not some radical terrorist imam; he was a renowned scholar of peace in Islam:

Ramadan is a Swiss-born scholar of Arab descent. He holds Masters Degrees in Philosophy and French Literature and a

⁴⁸⁷ *Id.*

⁴⁸⁸ *See id.*

⁴⁸⁹ *American Academy of Religion v. Chertoff* (American Academy of Religion I), 463 F. Supp. 2d 400 (S.D.N.Y. 2006) (Crotty, J.) (ordering the government to issue a final ruling on Tariq Ramdan’s visa); SUSAN HERMAN, TAKING LIBERTIES: THE WAR ON TERROR AND THE EROSION OF AMERICAN DEMOCRACY 9 (2011).

⁴⁹⁰ *Id.* at 404; *accord* *American Academy of Religion v. Chertoff* (American Academy of Religion II), No. 06 CV 588, 2007 WL 4527504, at *1 (S.D.N.Y. Dec. 20, 2007) (Crotty, J.).

⁴⁹¹ *American Academy of Religion I*, 463 F. Supp. 2d 404.

Ph.D. in Islamic Studies, all from the University of Geneva. He has published more than 20 books, 700 articles, and 170 audio tapes, most of which focus on the subject of Muslim identity and the practice of Islam in the Western world, particularly Europe. Ramadan is perhaps best known for his vision of an independent European Islam. Specifically, Ramadan encourages Europe's Muslims to 'reject both isolation and assimilation,' and instead explore 'the possibility of a "third path" that would allow European Muslims to be both fully European and fully Muslim.' Ramadan also advocates the development of an Islamic feminism and condemns the harsh penalties prescribed by the Islamic penal code. He shuns violence as a form of activism and has consistently spoken out against terrorism and radical Islamists.⁴⁹²

Professor Ramadan spoke at conferences and gave lectures in the United States several times from 2000 to 2003, and once "even delivered a speech *at the State Department*."⁴⁹³ Professor Ramadan accepted an appointment at the University of Notre Dame and applied for an appropriate visa.⁴⁹⁴ Initially, the visa was approved, but three months later the Department of Homeland Security "cancel[ed] [the] visa."⁴⁹⁵ The government curiously argued in court that Professor Ramadan "'has never had a visa revoked, a visa application denied, or any other adverse action taken against him.'"⁴⁹⁶

As a result of the government's action, Ramadan had to decline the Notre Dame position in December 2004 and was unconstitu-

⁴⁹² *Id.* at 404-405.

⁴⁹³ *Id.* at 406 (emphasis added).

⁴⁹⁴ *Id.* at 406 & n.10.

⁴⁹⁵ *Id.* at 406-408.

⁴⁹⁶ *Id.* at 408 (quoting Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction, at 7-8, *Am. Acad. Of Religion v. Chertoff*, 463 F. Supp. 2d 400 (S.D.N.Y. 2006), No. 06-Civ. 588 (PAC)).

tionally blocked from entering the United States to give lectures.⁴⁹⁷ Applying for a second visa, he was told that his application “‘would take at least two days but no more than two years.’”⁴⁹⁸

The Court was faced with a technical issue: The government had not granted him a visa but it also had not actually denied Professor Ramadan a visa, thus the issue was not ripe for decision. So, the judge issued a writ of mandamus, ordering the Departments of State and of Homeland Security to make a decision within ninety days.⁴⁹⁹

This set the stage for *American Academy of Religion v. Chertoff* (*American Academy of Religion II*) in 2007.⁵⁰⁰ There, the district court faced the same claims with a final agency determination, which eliminated the ripeness issue. The government “officially denied the visa and gave its reason: Professor Ramadan had contributed money to an organization which provided material support to Hamas, a terrorist group.”⁵⁰¹ The district court granted summary judgment to the government on both the First Amendment claim, and on the constitutionality of the portion of the PATRIOT Act that rendered Professor Ramadan inadmissible to the United States.⁵⁰² The court cited the typical excuses: institutional competency and deference to the legislature and executive on political questions.⁵⁰³

However, even this was not the end of the issue. The plaintiffs appealed the decision in the 2009 case, *American Academy of Religion v. Napolitano* (*American Academy of Religion III*).⁵⁰⁴ The Second Circuit

⁴⁹⁷ See *id.* at 407, 415–16.

⁴⁹⁸ *Id.* at 408 (quoting Declaration of Christopher K. Derrick, Apr. 24, 2006, at ¶ 5, *Am. Acad. Of Religion v. Chertoff*, 463 F. Supp. 2d 400 (S.D.N.Y. 2006), No. 06-Civ. 588 (PAC)).

⁴⁹⁹ *Id.* at 404, 422–23.

⁵⁰⁰ *American Academy of Religion II*, 2007 WL 4527504.

⁵⁰¹ *Id.* at *1.

⁵⁰² *Id.*

⁵⁰³ *Id.* at *15.

⁵⁰⁴ *Am. Acad. of Religion v. Napolitano* [*American Academy of Religion III*], 573 F.3d 115, 137–38 (2d Cir. 2009).

Court of Appeals overturned the district court's decision, holding that the State Department should have given Professor Ramdan a "reasonable opportunity to demonstrate, by clear and convincing evidence, that he did not know, and should not have reasonably known" that his money ended up in the hands of Hamas.⁵⁰⁵ The court vacated the district court's decision and remanded for further proceedings.⁵⁰⁶ The issue became moot, however, in 2010, when "Secretary of State Hilary Clinton issued Ramadan his visa."⁵⁰⁷

Despite the aberrations of the Bush era, and the unprecedented number of Espionage Act of 1917 prosecutions in the current Obama era, the Warren court's lasting impact has helped secure a strong legal protection for expressing dissent from war during period of hysteria—insulation for the dissenting voice of reason.

III. THE RIGHT TO PRIVACY

Battles over the Freedom of Speech began in 1798 with a few prosecutions over criticism of the president, and resulted in the abuses of World War I and the Red Scares before the Supreme Court finally stepped in. In contrast, the battlefield over the right to privacy is in its relative infancy. Although the institution of domestic spying on the general citizenry began under President Theodore Roosevelt following the assassination of President McKinley, the most egregious abuses began in the 21st century. The media has revealed that the NSA retained the Internet and telephony metadata records, as well as digital records of their content, from nearly every American. The Fourth Amendment is the next major battlefield that has come up in national security law.

This section traces domestic spying from its origin, to the COINTELPRO mass spying operation conducted under President

⁵⁰⁵ *Id.* at 137-38.

⁵⁰⁶ *Id.*

⁵⁰⁷ HERMAN, *supra* note 489, at 9.

Nixon, to the domestic dragnet cast by the NSA in the wake of 9/11 under presidents Bush and Obama.

A. THE RISE OF DOMESTIC SPYING

1. *The FBI and Domestic Spying: When Did the Government Start Spying on Americans?*

The FBI began as a crime-fighting force, but its practice slowly developed it into a spying arm of the federal government. In 1901, a radical anarchist assassinated President McKinley while he was giving a speech in Buffalo, NY. This event became the precipitation for domestic spying in the United States. “The Department of Justice and the Department of Labor had been keeping records on anarchists for [several] years,”⁵⁰⁸ but mere record-keeping was not effective enough to keep the President safe. Theodore Roosevelt, now President after the assassination, did not want to go the way of his predecessors Lincoln, Garfield, and McKinley. By 1907, the Department of Justice was relying heavily on Secret Service agents to conduct investigations for it.⁵⁰⁹

After Congress enacted legislation prohibiting the president’s personal bodyguard from working for his apolitical investigatory agency, Roosevelt, in 1908, secretly approved a “corps of special agents” responsible directly to the attorney general.⁵¹⁰ The group of secret agents soon became the Bureau of Investigation in 1909, which was tasked with enforcing the 1910 Mann Act, combating interstate prostitution.⁵¹¹ During World War I and the Red Scare, “the Bureau acquired responsibility for the Espionage, Selective Service, and Sabotage Acts and assisted the Department of Labor by

⁵⁰⁸ Jose Carlos Palma, *FBI—History*, SMART ENCYCLOPEDIA (May 20, 2013), <http://englishversion.smartencyclopedia.eu/index.php/43-the-fbi/82-fbi-history>.

⁵⁰⁹ A *Brief History of the FBI*, FBI.GOV (visited March 18, 2014), <http://www.fbi.gov/about-us/history/brief-history>

⁵¹⁰ *See id.*

⁵¹¹ *Id.*

investigating enemy aliens.”⁵¹² The future director of the FBI, J. Edgar Hoover, joined a subsector of the Bureau in 1917, the General Intelligence Division, assisting then Attorney General Palmer in spying on and persecuting political dissidents in the post-war Red Scare.⁵¹³

Hoover became Director of the FBI in 1924, staying in that post until his death in 1972.⁵¹⁴ Hoover began his term as director by turning the FBI into a professional crime-fighting force “glor[ified]” by Americans.⁵¹⁵ From the mid-twenties to the mid-thirties, the FBI shifted away from being the brute squad for political persecution. The G-Men “captured the public’s imagination” through coverage of the sensational capture stories of gangsters like Machine Gun Kelly, John Dillinger, and Pretty Boy Floyd.⁵¹⁶ This changed in the midst of the Brown Scare:

Seizing the opportunity Roosevelt presented in 1936 to enable the bureau to return to its earlier ways, Hoover confidentially instructed his agents “to obtain from all possible sources information concerning subversive activities being conducted in the United States by Communists, Fascists, and representatives” of other subversive organizations, defining ‘subversive activities’ as including, among other things, ‘the distribution of literature . . . opposed to the American way of life.’⁵¹⁷

Thus, in 1936, Hoover “revived [in total secrecy] the [FBI’s] General Intelligence Division” of World War I vintage, collecting

⁵¹² *Id.*

⁵¹³ *Id.*

⁵¹⁴ John Edgar Hoover, FBI.GOV (visited March 18, 2014), <http://www.fbi.gov/about-us/history/directors/hoover>.

⁵¹⁵ STONE, *supra* note 49, at 249.

⁵¹⁶ *Id.*

⁵¹⁷ *Id.*

and categorizing the names of thousands of “subversives.”⁵¹⁸ The federal government and the FBI would never abandon domestic spying operations again.

2. COINTELPRO, and the Rise of Domestic Spies

The most infamous of Hoover’s spying operations has come to be known as COINTELPRO (Counter Intelligence Program). Officially initiated in 1956, agents of the Bureau began to investigate organizations like the Ku Klux Klan, the Black Panthers, and the Socialist Workers Party, among others.⁵¹⁹ Techniques used by the FBI included anonymous phone calls, IRS audits, and other intrusive and sometimes illegal measures. In all, around seven different COINTELPRO operations existed at various times,⁵²⁰ implementing 2,370 counterintelligence actions.⁵²¹

The objectives of the COINTELPRO program reportedly included:

1. Gathering information (intelligence);
2. Crafting a negative public image of the targeted group;
3. Interfering with the group’s internal structure;
4. Instigating internal fighting and disagreement;
5. Limiting the group’s access to public resources;
6. Constraining protest and assembly abilities; and
7. Interfering with specific individuals and their ability to participate in the group.⁵²²

⁵¹⁸ *Id.* at 249-50.

⁵¹⁹ GARRETT M. GRAFF, *THE THREAT MATRIX: THE FBI AT WAR IN THE AGE OF GLOBAL TERROR* 63 (2011).

⁵²⁰ *Id.* at 63. Five were domestic operations and two focused on foreign intelligence. *Id.*

⁵²¹ *Id.*

⁵²² David Cunningham, *State versus Social Movement*, in *STATES, PARTIES, AND SOCIAL MOVEMENTS* 48, 56-60 (Cambridge University Press, Jack A. Goldstone, ed.

On a cool night in Media, Pennsylvania, in March 1971, members of the Citizen's Commission to Investigate the FBI, a group under investigation by the COINTELPRO operation, broke into the Bureau's field office. The group began in secret in 1970.⁵²³ By January 1971, they were casing the FBI office and learning the security procedures.⁵²⁴ Because the group did not know which documents were political files, they took *all of them* by stuffing them in suitcases and loading them into getaway cars.⁵²⁵ The burglars stole more than a thousand "poorly secured" dossiers and other documents which outlined the setup and shocking extent of the COINTELPRO program.

After putting the suitcases in the cars, the group separated and traveled along different paths to their rendezvous point.⁵²⁶ They carried on as normal and avoided socializing except at their secluded rendezvous point.⁵²⁷ For over a week afterward, after announcing their reasons for the burglary, the group took the time in silence to organize and prepare the files for distribution.⁵²⁸ The organization subsequently took the confidential documents to the press and the program was fully exposed to the American public.

Hoover swiftly declared an end to program and created guidelines for the future intelligence of domestic individuals and groups. The COINTELPRO program did not lead to a single criminal prosecution of any government officials, but instead to the creation of a special congressional committee in 1975 to investigate these crimes

2003); David Cunningham & John Noakes, *Effects of Covert Forms of Social Control on Social Movements*, in 10 *SOCIOLOGY OF CRIME, LAW AND DEVIANCE: SURVEILLANCE AND GOVERNANCE: CRIME CONTROL AND BEYOND* 184-85 (Emerald Grp. Publishing, Mathieu Deflem, ed. 2008).

⁵²³ BETTY MEDSGER, *THE BURGLARY: THE DISCOVERY OF J. EDGAR HOOVER'S SECRET* FBI 49 (Alfred A. Knopf, New York 2014).

⁵²⁴ *Id.* at 5-6.

⁵²⁵ *Id.* at 6-7.

⁵²⁶ *Id.* at 104.

⁵²⁷ *Id.* at 144.

⁵²⁸ *Id.* at 144, 163.

after that scandal was bolstered by Watergate. For the most part, the COINTELPRO operations were terminated in the early 1970s when the agents who facilitated the programs became weary of public exposure.⁵²⁹

The COINTELPRO directive epitomizes unconstitutional domestic government intrusion in the name of national security. There have been reports of FBI agents committing untold illegal and unconscionable behavior; causing antiwar activists to be evicted from their homes, disabling suspected peoples' cars, intercepting mail, breaking and entering, stealing documents, wiretapping phones, bugging conversations, and potentially more.⁵³⁰

3. *The Church Committee and the Foreign Intelligence Surveillance Act of 1978*

During the Ford Administration, in the wake of the CONINTELPRO, the Pentagon papers, Watergate, and President Nixon's resignation, the Senate created a special committee to investigate government intelligence operations.⁵³¹ The committee was named for its chairman, Sen. Frank F. Church (D-ID). The committee sat during 1975 and 1976, publishing fourteen reports and airing out the dirty laundry of the NSA, FBI, and CIA.⁵³² The agencies' activities ranged from opening and photographing hundreds of thousands of pieces of mail, to assassinating foreign leaders, to IRS

⁵²⁹ GRAFF, *supra* note 519, at 63

⁵³⁰ STONE, *supra* note 49, at 490.

⁵³¹ See Bill Moyers, *The Church Committee and FISA*, PBS.ORG (Oct. 26, 2007), <http://www.pbs.org/moyers/journal/10262007/profile2.html>.

⁵³² The full text of the Church Committee's reports is available in many places online. The Assassination Archive Records and Research Center, for example, provides them at *Church Committee Reports*, AARC PUBLIC LIBRARY CONTENTS (visited March 18, 2014), http://www.aarclibrary.org/publib/contents/church/contents_church_reports.htm.

abuses, to the exploitations of COINTELPRO.⁵³³ Its work inspired the creation of a special secret court to grant warrants for intelligence officials upon standards less than probable cause, and thus in violation of the Fourth Amendment.⁵³⁴

In response to decades of expansive executive action in regards to intelligence gathering,⁵³⁵ Congress passed the Foreign Intelligence Surveillance Act (FISA) in 1978.⁵³⁶ The act was poised to address Presidents who had been increasingly asserting “national security” interests in rationalizing their disdain for the Fourth Amendment.⁵³⁷

Under FISA, the government was authorized to monitor the communication of foreign entities and individuals who were agents of them, without a court order, for up to one year, *unless* the surveillance acquired the contents of any communication to which a United States person⁵³⁸ was a party. If the communication involves a United States person, judicial authorization is required within seventy-two hours of the government’s initial action.⁵³⁹

FISA also establishes a special federal court, known as the Foreign Intelligence Surveillance Court.⁵⁴⁰ A secret court with secret

⁵³³ See generally SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTERIM REPORT: ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, SEN. REP. NO. 94-465 (1975); 3-5 *Hearings Before the S. Select Committee to Study Governmental Operations with Respect to Intelligence Activities: Internal Revenue Service*, 94th Cong. (1975).

⁵³⁴ Moyers, *supra* note 531.

⁵³⁵ Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. at 1307 (2004) (“Since Franklin Roosevelt, presidents had asserted their ‘inherent authority’ to authorize wiretaps and other surveillance for national security purposes.”).

⁵³⁶ Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811.

⁵³⁷ Swire, *supra* note 535, at 1307.

⁵³⁸ § 1801(a)(1)-(3) (defining a “United States Person” as anyone who is a citizen, or a person lawfully admitted as a permanent alien resident, or, a corporation incorporated in the United States).

⁵³⁹ Swire, *supra* note 535, at 1307.

⁵⁴⁰ Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801

judges, the court was made up initially of seven, and now eleven, federal district court judges, appointed by the Chief Justice, who hear requests by the federal government for wiretap authorizations against suspected foreign intelligence agents inside the United States. If an authorization request is denied, the government may *not* apply to a different FISA judge. It may, however, appeal to the Foreign Intelligence Court of Review to address grievances.⁵⁴¹

The government must have probable cause of criminal behavior, and it must particularly describe the place to be searched or the person or thing to be seized for a judge to authorize a search warrant upon an individual or entity. FISA, however, established a new, lesser standard. Under the original FISA statute, an individual under suspicion need be an agent of a foreign power. Therefore, the government would only have to show a FISA Court judge probable cause that an individual was such an agent. Under the Act, this alone was sufficient for the judge to issue a warrant. The FISA Court and many parts of the Act itself have been amended repeatedly in the wake of the September 11, 2001 terrorist attacks. Discussed in the next section, the current federal government has irreverently disregarded the Constitution in its effort to “protect” America and abused this special court structure to conduct unprecedented, Big Brother-type data mining operations of all persons in America. The requirement of demonstrating suspicion and foreign agency would soon disappear.

B. THE RIGHT TO PRIVACY IN THE 21ST CENTURY

In the aftermath of the terrorist attack on 9/11 that killed 2,977 Americans, the Bush administration reorganized the federal national security organ in an overhaul matched only by Truman’s 1947 National Security Act, which created the NSA. The administration

⁵⁴¹ This is very rare. The first request to be appealed occurred in 2002. See *In re Sealed Case No. 02-001*, 310 F.3d 717 (2002) (per curiam).

permitted and aligned the laws to allow the NSA to have the legal power to get data on essentially every Internet or telephone use in the United States over the next decade.

The First, Fourth, and Fifth Amendment protections in the Constitution render such a program profoundly illegal. Additionally, the Administration lied about when it started domestic spying—domestic spying programs were active before 9/11.⁵⁴² The full extent of domestic spying during the Bush Administration is unknown to the public even today, but as reports roll out, it only appears more expansive and oppressive.

1. *The Immediate Aftermath of 9/11*

In the wake of September 11, Bush's first move was to broaden the authority granted to the NSA director. General Michael V. Hayden, then-Director of the National Security Agency, declared on September 26, 2001, "any Afghan telephone number in contact with a U.S. telephone number on or after 26 September was presumed to be of foreign intelligence value and could be disseminated to the FBI."⁵⁴³ This was spying based on status, not based on probable cause. The real action, however, began in October.

On October 2, Hayden and his friend, Vice President Dick Cheney, communicated passing messages via CIA Director George Tenet.⁵⁴⁴ Cheney was interested in seeing what more the NSA could

⁵⁴² See Ralph Lopez, *Bush-Cheney Began Illegal NSA Spying Before 9/11, Says Telcom CEO*, DIGITAL J. (June 17, 2013), <http://digitaljournal.com/article/352455#ixzz2b0vepcjB>; Shane Harris, *NSA Sought Data Before 9/11*, NAT'L J. (Nov. 2, 2007), <http://news.nationaljournal.com/articles/071102nj1.htm>; Shane Harris & Tim Naftali, *Why the NSA's Snooping is Unprecedented in Scale and Scope*, SLATE (Jan. 3, 2006 6:30 AM), http://www.slate.com/articles/news_and_politics/politics/2006/01/tinker_tailor_miner_spy.html.

⁵⁴³ NSA INSPECTOR GENERAL'S REPORT ON EMAIL AND TELEPHONE DATA COLLECTION UNDER STELLAR WIND 3 (2009) [hereinafter NSA INSPECTOR GENERAL'S RPT.], available at <http://www.theguardian.com/world/interactive/2013/jun/27/nsa-inspector-general-report-document-data-collection>.

⁵⁴⁴ *Id.* at 4; GRAFF, *supra* note 519, at 483.

do to prevent terrorism. Hayden, replying with “a wink and a nod,” said “[n]ot with my current authorities.”⁵⁴⁵ Cheney was also unhappy because the FBI had “to get [warrants]” before it could engage in “domestic eavesdropping.”⁵⁴⁶ John C. Yoo responded speedily, drafting a memo almost overnight which outlined “the president’s inherent surveillance powers” — powers never granted in the Constitution or by statute, powers never before claimed, and powers that were never intended to be granted to an unchecked executive, powers that derive from some source that neither Yoo nor his patron, President Bush, could or would identify.⁵⁴⁷

Following Yoo’s advice, Bush signed an order on October 4, 2001 that was drafted by Cheney’s legal counsel, David Addington.⁵⁴⁸ That order created the President’s Surveillance Program, known publicly as Terrorism Surveillance Program, and to the NSA as codename STELLARWIND.⁵⁴⁹ It was known more aptly as “the vice president’s special program.”⁵⁵⁰ Regardless of the name, as the program name has changed frequently over the course of the war, it refers to the unconstitutional fishing expedition that is the NSA’s warrantless dragnet of telephony and Internet metadata and content, generally known to the public at this writing.

From the outset, the Justice Department expressed unease about the program,⁵⁵¹ even though one of its own endorsed its legal underpinnings. Pursuant to the program, the NSA was permitted to collect telephony and Internet metadata *and* content—even that

⁵⁴⁵ NSA INSPECTOR GENERAL’S RPT., *supra* note 542, at 4; GRAFF, *supra* note 519, at 483.

⁵⁴⁶ GRAFF, *supra* note 519, at 483-84.

⁵⁴⁷ *Id.* at 483.

⁵⁴⁸ NSA INSPECTOR GENERAL’S RPT., *supra* note 543, at 7; GRAFF, *supra* note 519, at 483.

⁵⁴⁹ NSA INSPECTOR GENERAL’S RPT., *supra* note 543, at 7; GRAFF, *supra* note 519, at 483-84.

⁵⁵⁰ GRAFF, *supra* note 519, at 484.

⁵⁵¹ *Id.*

which was purely domestic.⁵⁵² Attorney General John Ashcroft signed off on the program without assessing its constitutionality or lawfulness. He asked Yoo to do that assessment three weeks later.⁵⁵³

This was the broadest known expansion of presidential spying powers in history.⁵⁵⁴ Between October and November 2001, telecommunications companies began voluntarily and secretly sharing data about their customers with the federal government.⁵⁵⁵ In 2002, these disclosures would become part of formal agreements between the government and telecommunications providers.⁵⁵⁶

2. *The PATRIOT Act of 2001*

On October 24, Congress passed the USA PATRIOT Act of 2001,⁵⁵⁷ an act that civil libertarians have railed against for the better part of thirteen years. “One of the most striking features of the USA PATRIOT Act is the lack of debate surrounding its introduction.”⁵⁵⁸ Despite the fact that “many of the provisions of the Act relating to electronic surveillance” had been debated and rejected in previous congressional sessions, and even though House members were giv-

⁵⁵² See NSA INSPECTOR GENERAL’S RPT., *supra* note 542, at 7-8.

⁵⁵³ *Timeline of NSA Domestic Spying*, ELEC. FRONTIER FOUND., <https://www EFF.ORG/NSA-spying/timeline> (visited March 18, 2014).

⁵⁵⁴ Harris & Naftali, *supra* note 542.

⁵⁵⁵ NSA INSPECTOR GENERAL’S RPT., *supra* note 542, at 11.

⁵⁵⁶ *Timeline of NSA Domestic Spying*, *supra* note 553.

⁵⁵⁷ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001) (codified at scattered sections of 8, 18, 22, 31, 42, 49, and 50 U.S.C.). Including private law sessions, the PATRIOT Act is codified at and touches upon fifteen different titles of the United States Code. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, GPO.GOV, <http://www.gpo.gov/fdsys/pkg/PLAW-107publ56/content-detail.html>.

⁵⁵⁸ *USA Patriot Act*, ELEC. PRIVACY INFO. CTR. (last updated Oct. 14, 2013), <http://epic.org/privacy/terrorism/usapatriot/>.

en a mere *fifteen minutes* to read this 300-plus-page bill, the PATRIOT Act passed the House by a vote of 357-to-66.⁵⁵⁹

Every section of the Act is offensive to the Constitution for some reason or another. This discussion is limited to the most relevant provisions, determined by the demonstrable impact they have had on society. Specifically, this discussion relates to selected portions of Title II of the Act, which purports to give the government unnatural, unconstitutional, and illegal authority to perform electronic surveillance.

We begin with § 201 of the PATRIOT Act. As the Electronic Privacy Information Center concisely explains:

Section 201 added crimes of terrorism or production/dissemination of chemical weapons as predicate offenses under Title III, suspicion of which enable the government to obtain a wiretap of a party's communications. Because the government already had substantial authority under FISA to obtain a wiretap of a suspected terrorist, the real effect of this amendment is to permit wiretapping of a United States person suspected of domestic terrorism.⁵⁶⁰

This section is particularly invidious because the government is getting the typically-more-difficult-to-get wiretap warrants, rather than a basic search warrant.

Section 206 of the Act relates to “roving surveillance authority.”⁵⁶¹ This has been nicknamed the “roving wiretaps” provision. Section 206 gives the federal government the authority to “intercept[] any communications made to or by an intelligence target

⁵⁵⁹ Interview with Former Rep. Bob Barr (R-GA), U.S. House of Representatives (Jan. 2010); see also Andrew P. Napolitano, *When the Government Demands Silence*, FOX NEWS (Mar. 21, 2013), <http://www.foxnews.com/opinion/2013/03/21/when-government-demands-silence-ugliness-patriot-act/>.

⁵⁶⁰ *Id.*

⁵⁶¹ See PATRIOT Act, Pub. L. No. 107-56, § 206, 115 Stat. at 282 (2002).

without specifying” the particular places or things to be searched.⁵⁶² The Fourth Amendment to the Constitution provides that

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁵⁶³

Clearly there is a misalignment between the requirements which § 206 purports to make law, and the supreme law of the land.⁵⁶⁴

The more invidious attack on individual rights came in the form of secrecy. The previous incarnation of FISA required third parties (such as common carriers and others) ‘specified in court-ordered surveillance’ to provide assistance necessary to accomplish the surveillance.”⁵⁶⁵ After the enation of § 206, the government did not need to specify from what third party it was compelling data disclosure.⁵⁶⁶ For instance, the government could (and later it was revealed it did), compel Internet and telephone carriers to turn over all of the “business records” that the government requires, such as the metadata and content of hundreds of millions of innocent telecommunication transactions that occurred in the United States in the last few years.

Relatedly, § 210 of the Act enabled the government to access the duration of a call and the time it was both placed and ended, any “telephone or instrument number or other subscriber number or

⁵⁶² See *USA Patriot Act*, *supra* note 558.

⁵⁶³ U.S. CONST. amend. IV.

⁵⁶⁴ See *USA Patriot Act*, *supra* note 558. (“The ‘generic’ roving wiretap orders raise significant constitutional issues, as they do not comport with the Fourth Amendment’s requirement that any search warrant ‘particularly describe the place to be searched.’”).

⁵⁶⁵ *Id.*

⁵⁶⁶ § 206, 115 Stat. at 282; *PATRIOT Act*, *supra* note 560.

identity, including any temporarily assigned network address,” and “any credit card or bank account number” paying for the provided service.⁵⁶⁷

The phrase “pursuant to an operation of law” is standard, boilerplate content of every contract agreement in which the government is a party or in which it has an interest. It is used to create an exception to the obligation of a party to a contract to keep secret the contents or working of the agreement. Thus, when that phrase appears in almost every Internet company’s contract, it permits § 206 disclosure, in addition to what is specified in a valid warrant. This is a key distinction that has become more and more relevant in the wake of Edward Snowden’s 2013 revelations about NSA spying.

Section 204 permits the government to obtain “stored voice-mail communications, like e-mail . . . through a search warrant rather than through more stringent wiretap orders.”⁵⁶⁸ This works in tandem with another section of the Act, §209, which permits nationwide warrants to issue from federal courts. Essentially, an administration-friendly judge in the District of Columbia could issue a secret search warrant for a San Diego resident’s voicemails.

One of the more invidious portions of the act is § 213, the “sneak and peek” warrant provision. Law enforcement must provide notice to the person whose place or things have been searched. This requirement flows from the Fourth Amendment’s consideration of the reasonableness of a search or seizure. Under § 213, warrants issued pursuant to this section or “*any other* rule of law[] to search for and seize any property or material that constitutes evidence of a criminal offense in violation of the laws of the United States” may be executed by sneaking and peeking.⁵⁶⁹ So really what sort of notice does § 213 require? What government officials deter-

⁵⁶⁷ § 201, 115 Stat. at 283; *PATRIOT Act*, *supra* note 560.

⁵⁶⁸ §§ 204, 209; 115 Stat. at 281, 283; *PATRIOT Act*, *supra* note 560.

⁵⁶⁹ § 213; 115 Stat. at 285-86 (emphasis added).

mine is “within a reasonable period of [the warrant’s] execution.”⁵⁷⁰ This section is unconstitutional on its face, and has since been somewhat abrogated.⁵⁷¹

Sections 214 and 216 work in tandem. “Section 214 removes the pre-existing statutory requirement that the government prove the surveillance target is ‘an agent of a foreign power’ before obtaining a pen register/trap and trace order under the FISA.”⁵⁷² Broadly, the government can track any communications under the FISA, without making any showing of the “foreign” part of the act. Essentially, it puts all persons in the United States, citizens and non-citizens, on the same legal footing as foreign spies, having argued successfully to secret FISA court judges, and without adversarial opposition, that we are all *capable* of communicating with foreign agents.

Section 216 expands the traditional definition of a pen register. The term pen register originates in old telegram and telephone company practices and referred to the outgoing call log a telephone company kept on customers for billing purposes. After § 216, it meant a lot more: “a device or process which records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted” but for the actual content.⁵⁷³ This expanded definition broadly includes telephony and internet data.

Section 215, a.k.a the library records provision or the business records provision, has drawn intense scrutiny in recent days. Section 215 permits the government to access “business records, medical records, educational records and library records without a showing of ‘probable cause’ [as] . . . the government only needs to

⁵⁷⁰ § 213(b)(3), 115 Stat. at 286.

⁵⁷¹ 18 U.S.C. § 3103a(b)(3) (2012) (amending section 213 to now read that “the warrant provides for the giving of such notice within a reasonable period not to exceed 30 days after the date of its execution, or on a later date certain if the facts of the case justify a longer period of delay.”).

⁵⁷² § 214, 115 Stat. at 286-87; *USA Patriot Act*, *supra* note 557.

⁵⁷³ § 216, 115 Stat. at 290.

claim that the records may be related to an ongoing investigation related to terrorism or intelligence activities.”⁵⁷⁴ These “business records” include *all* the data maintained or kept by all third party custodians—it refers quite literally to every business record, including what would appear on a monthly phone or Internet or credit card bill. Today, it means the *content* of all telephone conversations and emails and text messages.⁵⁷⁵ Finally, § 218 of the Act changed the requirement for seeking FISA warrants, lowering the bar from obtaining foreign intelligence being “the purpose” to “a significant purpose.”⁵⁷⁶

The PATRIOT Act, Title V, § 505, a.k.a. the National Security Letter provision, permits federal agents, on their own, and without any warrant, to compel a third party, i.e. a service provider, to turn over stored electronic communications without notice to the owner of the communications. The agents are not under FISA’s former standard of demonstrating the communicator is an “agent of a foreign power.” Instead, the agents merely needed to meet the “broad standard of relevance [of the sought material] to investigations of terrorism or clandestine intelligence activities.”⁵⁷⁷ This marks a return to the practice of writs of assistance, whereby British soldiers

⁵⁷⁴ *USA Patriot Act*, *supra* note 558; *see also* § 215, 115 Stat. at 287-88 (codified at 50 U.S.C. § 1861 (2012)).

⁵⁷⁵ *See* Declan McCullagh, *NSA Spying Flap Extends to Content of U.S. Phone Calls*, CNET (June 15, 2013, 4:39 PM), http://news.cnet.com/8301-13578_3-57589495-38/nsa-spying-flap-extends-to-contents-of-u.s-phone-calls/; F. Michael Maloof, *Yes, NSA Has Content of Phone Calls, Emails: Intelligence Collection Not Limited to Metadata*, WND (June 10, 2013, 7:56 PM), <http://www.wnd.com/2013/06/yes-nsa-has-content-of-phone-calls-emails/>.

⁵⁷⁶ § 218, 115 Stat. at 291.

⁵⁷⁷ § 505, 115 Stat. at 365 (2001) (codified at 18 U.S.C. § 2709 (2012)); *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 483 & n.40 (S.D.N.Y. 2004), *vacated* *Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006).

could utilize general warrants authority *to authorize themselves* to enter the home of any colonist in the pre-Revolutionary War Era.⁵⁷⁸

3. "Total Information Awareness"

By January 2002, with the PATRIOT Act and the President's Surveillance Program in tow, the Bush Administration made additional moves towards achieving the Orwellian horror state. In a hidden subsector of a project of the Department of Defense, Bush, Cheney, and project director Vice Admiral John M. Poindexter sought to achieve "total information awareness" by "constructing a computer system that could create a vast electronic dragnet, searching for personal information as part of the hunt for terrorists around the globe — including [within] the United States."⁵⁷⁹ This particular task of creating total information awareness was to be carried out by the Information Awareness Office.⁵⁸⁰ The program's mission was to

provide intelligence analysts and law enforcement officials with instant access to information from Internet mail and calling records to credit card and banking transactions and travel documents, without a search warrant.⁵⁸¹

The Information Awareness Office was just one subset of the President's Surveillance Program; the PSP included many items

⁵⁷⁸ *Writ of Assistance*, ENCYCLOPAEDIA BRITANNICA ONLINE (2013), <http://www.britannica.com/EBchecked/topic/39372/writ-of-assistance>.

⁵⁷⁹ John Markoff, *Pentagon Plans a Computer System That Would Peek at Personal Data of Americans*, N.Y. TIMES (Nov. 9, 2002), <http://www.nytimes.com/2002/11/09/politics/09COMP.html>.

⁵⁸⁰ *Id.*

⁵⁸¹ *Id.* Many of these speeches are available on the internet. See, e.g., John Poindexter, Director, Information Awareness Office, Remarks at DARPA Tech 2002 Conference, Anaheim, Calif., (Aug. 2, 2002), available at <http://www.fas.org/irp/agency/dod/poindexter.html>.

under codename STELLARWIND, such as the Terrorist Surveillance program.⁵⁸²

As the 2013 revelations about PRISM and the FISA court orders have demonstrated, total information awareness has been achieved.⁵⁸³ Big Brother continues to maintain a treasure trove of personal data on all persons in America since circa 2009.⁵⁸⁴

4. *PRISM Takes the Torch: The Protect America Act of 2007 and the 2008 FISA Court Amendments*

The Bush administration was in bad political shape in September 2006. Bush and Cheney did not have the political capital to maintain their vast data and military empire that dug into every aspect of American lives. The Executive could no longer be answerable for such a program as the PSP—the American people wouldn’t stand for it.⁵⁸⁵ Thus, President Bush “decided not to reauthorize these activities and the final Presidential Authorization expired on February 1, 2007” in order to “work on the transition of authority” to a body that can’t be held accountable: The judiciary.⁵⁸⁶ And

⁵⁸² Ryan Lizza, *State of Deception: Why Won't the President Rein in the Intelligence Community?*, NEW YORKER (Dec. 16, 2013), http://www.newyorker.com/reporting/2013/12/16/131216fa_fact_lizza?currentPage=all.

⁵⁸³ See David Gilson, Alex Park, & AJ Vicens, *The Domestic Surveillance Boom, From Bush to Obama: Timeline: Prism, Total Information Awareness, and Other Moment sin Electronic Eavesdropping After 9/11*, MOTHER JONES (June 7, 2013, 2:56 AM), <http://www.motherjones.com/politics/2013/06/timeline-nsa-domestic-surveillance-bush-obama>.

⁵⁸⁴ See Kashmir Hill, *Blueprints Of NSA's Ridiculously Expensive Data Center In Utah Suggest It Holds Less Info Than Thought*, FORBES (July 24, 2013, 5:11 PM), <http://www.forbes.com/sites/kashmirhill/2013/07/24/blueprints-of-nsa-data-center-in-utah-suggest-its-storage-capacity-is-less-impressive-than-thought/>

⁵⁸⁵ Benjamin R. Farley, *Drones and Democracy: Missing Out on Accountability*, 56 S. TEX. L. REV. 385, 396-401 (2012) (describing the contours of “political accountability” and the effect of the vote on accountable leaders).

⁵⁸⁶ See OFFICES OF THE INSPECTORS GENERAL, REPORT NO. 2009-0013-AS, UNCLASSIFIED REPORT ON THE PRESIDENT’S SURVEILLANCE PROGRAM V, at 30-31 (July 10, 2009), available at <https://www.fas.org/irp/eprint/psp.pdf>.

thereby, “[c]ertain activities that were originally authorized as part of the PSP have subsequently been authorized under orders issued by the Foreign Intelligence Surveillance Court (FISC).”⁵⁸⁷

The President needed Congress to approve the shift of accountability; FISA and the power to modify federal court jurisdiction belonged expressly to a Congress which has always jealously guarded those prerogatives. Thus, through two acts of Congress, political accountability shifted away from the Executive to the judiciary through the collusion of the political branches. This was accomplished through the Protect America Act of 2007 and the FISA Amendments Act of 2008, which bridged the gap from unconstitutional executive program, to executive program with the imprimatur of a secret Article III court.⁵⁸⁸

The Protect America Act of 2007 modified FISA to permit the “acquisition” of information, so long as “reasonable” procedures were in place for gaining electronic intelligence information on people “reasonably believed to be located outside the United States” with a “significant purpose” of acquiring foreign intelligence information, regardless of citizenship, and *pursuant to the directive of the Director of National Intelligence and Attorney General*.⁵⁸⁹ The Fourth Amendment certainly had a different bar for governmental interference with private communications. Moreover, the new law conscripted the assistance of “service provider, custodian, or other person (including any officer, employee, agent, or other specified person of such service provider, custodian, or other person) who has access to communications, either as they are transmit-

⁵⁸⁷ *Id.* at 30.

⁵⁸⁸ FISA Amendments Act of 2008, Pub. L. 110-261, 122 Stat. 2436 (2008); Protect America Act of 2007, Pub. L. 110-55, 121 Stat. 552 (2007).

⁵⁸⁹ See Protect America Act of 2007, 121 Stat. at 552-53; ACLU Fact Sheet on the “Police America Act”, ACLU (Aug. 7, 2007), <https://www.aclu.org/national-security/aclu-fact-sheet-%E2%80%9Cpolice-america-act>.

ted or while they are stored” in complying with the executive directives.⁵⁹⁰

The Protect American Act included an “appeals” mechanism, however: “The court's Review [would] be limited to whether the Government's determination is clearly erroneous.” Moreover, that determination was limited to whether the Justice Department and NSA’s “procedures are reasonably designed to ensure that acquisitions conducted . . . do not constitute electronic surveillance.”⁵⁹¹ The Act passed in the Senate in a vote of 60-to-28, and in the House in a vote of 227-to-183.

The FISA Amendment Acts of 2008 added a new Title VII to FISA.⁵⁹² The Act iterated the same compulsory requirements of the Protect America Act; however, it contained a new, invidious twist in § 702 that continued the deepest data mining of the now-defunct PSP program:

“(h) Directives and Judicial Review of Directives. —

“(1) Authority. — With respect to an acquisition
ized . . . [by] the Attorney General and the Director of National Intelligence . . . , in writing, an electronic communication service provider to — “(A) immediately provide the Government with all information, facilities, or assistance necessary to accomplish the acquisition in a manner that will protect the secrecy of the acquisition and produce a minimum of interference with the services that such electronic communication service provider is providing to the target of the acquisition; and “(B) maintain under security procedures approved by the Attorney General and the Director of National Intelligence any records concerning the

⁵⁹⁰ Protect America Act of 2007, 121 Stat. at 552-53.

⁵⁹¹ *Id.* at 555.

⁵⁹² FISA Amendments Act of 2008, 122 Stat. at 2437.

acquisition or the aid furnished that such electronic communication service provider wishes to maintain.⁵⁹³

Not only was the government going to compensate the telecommunications and Internet companies for their silent betrayal of essentially all American data they had, it also released them from criminal and civil liability.⁵⁹⁴ The FISA court merely had the power to review for some vague unlawfulness and whether the conduct was “electronic surveillance,” whatever that amorphous term means.⁵⁹⁵

The new Acts accomplished the PSP’s goals and practical effects under the secret eye of the FISA court, which later revelations would show had significant trouble dealing with the NSA’s brazen lawlessness. The new NSA program created pursuant to this accountability-shifting § 702 of the FISA Amendments Act, the Protect America Act of 2007, and § 215 of the PATRIOT Act was entitled “PRISM” and would be continued into the presidency of Barack Obama.⁵⁹⁶

⁵⁹³ *Id.* at tit. VII, § 702 122 Stat. at 2441.

⁵⁹⁴ *Id.* at tit. VII, § 702 (2), (3) 122 Stat. at 2441.

⁵⁹⁵ *See id.* at 122 Stat. tit. VII, § 702, at 2438-2448.

⁵⁹⁶ *See, e.g.,* Margot Kaminski, *PRISM's Legal Basis: How We Got Here, and What We Can Do to Get Back*, THE ATLANTIC (June 7, 2013), <http://www.theatlantic.com/national/archive/2013/06/prisms-legal-basis-how-we-got-here-and-what-we-can-do-to-get-back/276667/>; Timothy B. Lee, *How Congress Unknowingly Legalized PRISM in 2007*, WASH. POST WONKBLOG (June 6, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/06/how-congress-unknowingly-legalized-prism-in-2007/>.

C. THE OBAMA ADMINISTRATION: PRISM, FISA, AND THE
SNOWDEN CONTROVERSY

1. *Hopelessly Without Change: Reauthorization and Expansion of
the Worst Acts*

As a senator, Barack Obama was opposed to NSA terrorist surveillance programs unless authorized by the FISA court, which he believed to have exclusive jurisdiction over foreign intelligence warrants.⁵⁹⁷ As a president, he would give full-throated endorsement to Bush's police state-like domestic spying programs, picking up the torch of PRISM and using the Justice Department to continue litigation against the advances made by district courts against the PATRIOT Act during the Bush years.

President Obama ended up signing Bush's signature piece of legislation back into law until 2015: The PATRIOT Act.⁵⁹⁸ What about the FISA Amendments Act? Reauthorized until 2017.⁵⁹⁹ The Protect America Act? It became part of the FISA Amendments Act so that will be around until 2017, as well. Obama picked up right where Bush's pen left off, signing the same bills for more years. In addition, since 2010, Obama's NSA has been cataloguing American's social networks, "exploiting its huge collections of data to create sophisticated graphs of . . . American's social interactions that can identify their associates, their locations at certain times, their

⁵⁹⁷ Alexander Lane, *Obama's Wiretapping Flip-Flip? Yes*, POLIFACT (July 14, 2008, 5:47 PM), <http://www.politifact.com/truth-o-meter/article/2008/jul/14/obamas-wiretapping-flip-flop-yes/>.

⁵⁹⁸ PATRIOT Sunsets Extension Act of 2011, Pub. L. 112-14, 126 Stat. 216 (May 26, 2011) (codified at 50 U.S.C. §§ 1805, 1861, 1862) (extending the PATRIOT Act to June 1, 2015).

⁵⁹⁹ FISA Amendments Act Reauthorization Act of 2012, Pub. L. 112-238, 126 Stat. 1631 (2012).

traveling companions, and other personal information . . . 'without having to check foreignness.'⁶⁰⁰

2. *The Espionage Act of 1917 and Reportergate*

In the name of national security, more than any predecessor, Obama has fortified the Espionage Act of 1917 as a tool for domestic and political spying in contravention of constitutional constraints on the executive. As of May 2013, the Obama Justice Department had "used the Espionage Act of 1917 six times to bring cases against government officials for leaks to the media six times—twice as many as all their predecessors combined."⁶⁰¹ By June, that number had climbed to eight:

NSA whistleblower Thomas Drake was charged under the law in April 2010 for retaining classified information on secret surveillance programs. The government claimed it was for the purpose of disclosure.

For disclosing classified information on FBI wiretaps to a blogger, FBI translator named Shamai Leibowitz was charged under the Espionage Act.

Pfc. Bradley Manning was charged with multiple violations of the Espionage Act in July 2010 after disclosing US government information to WikiLeaks.

Stephen Kim, a former State Department contractor, was charged in August 2010 for revealing classified information

⁶⁰⁰ James Risen & Laura Poitras, *N.S.A. Examines Social Networks of U.S. Citizens*, N.Y. TIMES (Sept. 29, 2013), http://www.nytimes.com/2013/09/29/us/nsa-examines-social-networks-of-us-citizens.html?pagewanted=all&_r=0

⁶⁰¹ Michael Barone, *More than All Past Presidents, Obama Uses 1917 Espionage Act to Go After Reporters*, WASH. EXAMINER (May 22, 2013, 7:06 PM), <http://washingtonexaminer.com/michael-barone-more-than-all-past-presidents-obama-uses-1917-espionage-act-to-go-after-reporters/article/2530340>.

on North Korea to Fox News reporter James Rosen. (Rosen was labeled an “aider, abettor and co-conspirator” in the leak.)

In December 2010, a former CIA officer, Jeffrey Sterling, was charged under the Espionage Act after he communicated with New York Times reporter James Risen about Iran’s nuclear program in the 1990s. (The Obama Justice Department has fought in the courts to have a judge require Risen to testify against Sterling.)

John Kiriakou, a former CIA officer, was charged under the Espionage Act in January 2012 after he shared information related to a rendition operation with reporter Matthew Cole.⁶⁰²

The Eighth is Edward Snowden.

The Obama administration went a bridge too far when it began hunting down media leaks by hacking into a reporter’s email accounts. When the Steven Kim investigation reached into the emails of Fox News reporter, and my colleague, James Rosen, it set off a chain of events that revealed how far Obama was willing to go.

Kim has been accused of passing classified information about North Korea’s nuclear program to Rosen.⁶⁰³ Attorney General Holder recognized the leak after reading an article by Rosen about North Korea in 2009. Through a secret subpoena signed by Holder, the DOJ tracked Rosen’s movements, phone calls, and emails since

⁶⁰² Kevin Gosztola, *Snowden Becomes Eighth Person to Be Charged with Violating the Espionage Act under Obama*, FIREDOGLAKE.COM (June 21, 2013, 8:26 PM), <http://dissenter.firedoglake.com/2013/06/21/snowden-becomes-eighth-person-to-be-indicted-for-espionage-by-the-obama-justice-department/>.

⁶⁰³ Ryan Lizza, *How Prosecutors Fought to Keep Rosen’s Warrant Secret*, NEW YORKER (May 24, 2013), <http://www.newyorker.com/online/blogs/newsdesk/2013/05/how-justice-fought-to-keep-rosens-warrant-secret.html>.

2009.⁶⁰⁴ After the Justice Department had built enough evidence against Kim by secretly stalking him, they needed to get *admissible* evidence and after being turned down by two judges, finally found a compliant judge to issue a secret search warrant.⁶⁰⁵ Then the scandal avalanched. Later reports revealed that the Obama spy machine's phone record data acquisitions "included 'thousands and thousands' of calls in and out of the news organization [the Associated Press]," as well as Fox News.⁶⁰⁶

All the meanwhile, what was the Obama administration's legal theory for this chilling and deplorable attack on the Freedom of the Press? The Espionage Act of 1917. The act, which, as discussed, was arguably invalidated by the Pentagon Papers case, and which has been used against publications as a perversion of its intent, criminalized leaking classified information and was written so opaquely as to allow reporters who receive such information to be listed as co-conspirators or aiders or abettors. In its application for the search warrant of Rosen's personal and Fox News emails, the government told a federal judge that Rosen had conspired to commit *espionage* when he *received true information*. It is clear that this legal reasoning has been dead since the Pentagon Papers Case.⁶⁰⁷

⁶⁰⁴ Ann E. Marimow, *A Rare Peek into a Justice Department Leak Probe*, WASH. POST (May 19, 2013), http://www.washingtonpost.com/local/a-rare-peek-into-a-justice-department-leak-probe/2013/05/19/0bc473de-be5e-11e2-97d4-a479289a31f9_story.html.

⁶⁰⁵ *Id.*

⁶⁰⁶ Michael Calderone, *AP CEO Says DOJ Seized Records For 'Thousands And Thousands' Of Phone Calls: Staffer*, HUFF. POST BLOG (May 29, 2013, 2:28 PM), http://www.huffingtonpost.com/2013/05/29/ap-doj-records-phone-calls_n_3353978.html.

⁶⁰⁷ See *New York Times Co. v. United States*, 403 U.S. 713 (1971) (holding that a newspaper may publish true classified information it merely receives).

3. *Edward Snowden and PRISM*

In 2013, whistle-blower Edward Snowden revealed the existence of the NSA's unprecedented mass eavesdropping on roughly 113 million American persons (almost one-third of the U.S. population) without probable cause or a warrant specifying any person. The spying program gathered telephonic metadata on cellular telephone SMS, telephone, MMS, or Internet transactions conducted by any telecommunications provider. Additionally, it recorded the data moving through the servers of Internet Service providers, effectively gathering all Internet transaction data available on the net as well. *The Guardian* of London wasted no time publishing the documents and a series of articles revealing that Big Brother is alive and well; the public learned that U.S. citizens and residents not connected to terrorism activity or persons linked thereto—mere customers of Verizon—were also swept up in the NSA's spying.

Amid a growing post-September 11th intelligence network that relies heavily upon private contractors to supplement government work, Edward Snowden singularly emerges as a contractor that posed an inherent bureaucratic risk to Obama's spymasters: He had access to troves of classified files on the NSA's warrantless spying programs, and the personal outrage at America's secret intelligence gathering, and the personal courage to reveal it.⁶⁰⁸ In June 2013, after spending months having limited and encrypted communications with Glenn Greenwald of the *Guardian* and Laura Poitras, a documentary filmmaker, to build trust, Snowden released thousands of NSA files, many of which were marked Top Secret and had

⁶⁰⁸ Dana Priest and William M. Arkin, *Top Secret America: A Hidden World, Growing Beyond Control*, Washington Post (2010), <http://projects.washingtonpost.com/top-secret-america/articles/a-hidden-world-growing-beyond-control/1/>; Tom Gjelten, *The Effects of the Snowden Leaks Aren't What He Intended*, NPR (Sept. 20, 2013), <http://www.npr.org/2013/09/20/224423159/the-effects-of-the-snowden-leaks-arent-what-he-intended>.

the most limited circulation amongst government documents within the federal government.⁶⁰⁹

PRISM is simply a new face on an old program. President Bush authorized the NSA dragnet operation in the wake of 9/11 as the Terrorist Surveillance Program or the President's Surveillance Program. When a minor leak about the program occurred in the New York Times in 2005, the program stalled and required new legal authorizations to proceed. The Protect America Act of 2007 and the FISA Amendments Act of 2008 provided that legal cover and President Bush reauthorized the program as PRISM, which President Obama took the reins of in 2009.

Almost immediately after the 9/11 attacks, George W. Bush authorized the President's Surveillance Program, codename STELLARWIND, to monitor without warrant and in secret the electronic communications of millions of American persons.⁶¹⁰

In 2005, after withholding it for a year, the *New York Times* ignited a scandal when it reported the existence of one subset of the PSP, the Terrorist Surveillance Program, surveying mere thousands.⁶¹¹ In February 2007, Bush did not renew his PSP amidst public clamor over privacy concerns and serious blows to the Bush legal

⁶⁰⁹ Ewen MacAskill, *Edward Snowden: How the Spy Story of the Age Leaked Out*, CNN.COM (June 11, 2013), available at <http://www.theguardian.com/world/2013/jun/11/edward-snowden-nsa-whistleblower-profile>.

⁶¹⁰ Glenn Greenwald & Spencer Ackerman, *NSA Collected US Email Records in Bulk for More Than Two Years Under Obama*, THE GUARDIAN (June 27, 2013), <http://www.theguardian.com/world/2013/jun/27/nsa-data-mining-authorised-obama>.

⁶¹¹ Interestingly, Snowden cites the *Times*' decision to withhold the story as a reason he approached the *Guardian* instead of the grey lady: He felt that withholding from the public such information for so long a time, especially during a presidential campaign involving the incumbent president, undermined the journalistic integrity and values behind traditional press, and sought out a contemporary to which he could leak the documents. See MacAskill, *supra* note 609; Peter Maass, Q. & A.: *Edward Snowden Speaks to Peter Maass*, N.Y. TIMES (August 13, 2010), <http://www.nytimes.com/2013/08/18/magazine/snowden-maass-transcript.html>.

regime surrounding its secret eavesdropping program in the summer of 2006.⁶¹²

PRISM supplemented the NSA's already robust collection of communications, gathering information at servers from several major U.S. providers, including: Microsoft, Yahoo, Google, Facebook, PalTalk, AOL, Skype, YouTube, and Apple.⁶¹³ The named service providers denied that the NSA via PRISM had "direct" access to their servers, and later revised public statements on the matter specifically to note that access only came when specific orders were issued by the courts, a much clearer sign that information dissemination, if any, was involuntary.⁶¹⁴

The government wasted no time in bringing the tool of the 1917 Espionage Act out to go after Snowden. After turning over the documents in Hong Kong, Snowden quickly hid himself until he could board an Aeroflot trip to Moscow and seek asylum from other nations.⁶¹⁵ On June 23, Snowden left Hong Kong; the day before, the U.S. government unsealed a criminal complaint charging Snowden under the Espionage Act of 1917 for illegally leaking national defense and classified intelligence communications.⁶¹⁶ The very nature of Snowden's leak, lifting the veil on a massive intelligence gathering network that attacked constitutional limits, moved the caught-red-handed feds to charge him.

⁶¹² See, e.g., *Hepting v. AT&T Corp.*, No. C-06-672 VRW, 2006 WL 1581965 (N.D. Cal. June 6, 2006) (ordering the government to give out documents despite their assertion of the States Secrets privilege); Dan Eggen & Dafna Linzer, *Judge Rules Against Wiretaps*, WASH. POST (Aug. 18, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/17/AR2006081700650.html>.

⁶¹³ Timothy B. Lee, *Here's Everything We Know About PRISM to Date*, WASH. POST WONKBLOG (June 12, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/12/heres-everything-we-know-about-prism-to-date/>.

⁶¹⁴ *Id.*

⁶¹⁵ *Timeline: Edward Snowden's Journey*, ASSOCIATED PRESS (August 1, 2013), available at <http://news.yahoo.com/timeline-edward-snowdens-journey-150444823.html>.

⁶¹⁶ *United States v. Snowden*, Case No. 1:13 CR 265 (CMH) (E.D. Va. May 2013), available at <http://apps.washingtonpost.com/g/documents/world/us-vs-edward-j-snowden-criminal-complaint/496/>.

The criminal complaint against Snowden twice charged him with violations of the Espionage Act of 1917.⁶¹⁷

4. *Secret Laws Uncovered: Declassified FISA Court Opinions*

Before Snowden's massive intelligence leak, the federal courts had begun hearing suits aimed at forcing the Justice Department and NSA disclose FISA Court cases where the government applied for access to information and the FISA Court granted the application.⁶¹⁸ The Freedom of Information Act lawsuits came from civil liberties and digital rights groups—ACLU, NYCLU, Electronic Frontier Foundation (EFF)—and sought to shed sunlight on the lack of transparency in the Justice Department and NSA's wiretapping procedures and results.⁶¹⁹

The Justice Department announced in September 2013 it would declassify hundreds of documents on the broad array of the NSA's domestic surveillance programs, all aimed at counterterrorism investigations and limited in scope to investigating terrorism or suspected terrorists, by releasing FISA Court opinions and orders and some government submissions and compliance reports to the FISA Court.⁶²⁰ The response came after a federal judge in Oakland ordered the Justice Department to disclose documents, and not as a voluntary move by the Obama Administration.⁶²¹

⁶¹⁷ Glenn Greenwald, *On the Espionage Act Charges Against Edward Snowden*, THE GUARDIAN (June 22, 2013 7:18 pm), <http://www.theguardian.com/commentisfree/2013/jun/22/snowden-espionage-charges>.

⁶¹⁸ See Trevor Timm, *Hundreds of Pages of NSA Spying Documents to be Released As Result of EFF Lawsuit*, ELECTRONIC FRONTIER FOUNDATION (Sept. 5, 2013), <https://www.eff.org/deeplinks/2013/09/hundreds-pages-nsa-spying-documents-be-released-result-eff-lawsuit>.

⁶¹⁹ *Id.*

⁶²⁰ Paul Elias, *Feds Plan to Release Details of Secret Spy Court*, ASSOCIATED PRESS (Sept. 10, 2013), available at <http://news.yahoo.com/feds-plan-release-details-secret-spy-court-144030488.html>.

⁶²¹ *Id.*

Amongst the newly released documents were several FISA Court opinions that created a legal timeline of the NSA's authorization for warrantless wiretapping after the Bush era program was revealed. Beginning in 2006, the FISA Court authorized the NSA to gather telephony metadata (data on calls and callers that resembles the envelope of a letter – address and name only, not contents of the communication itself) information without a warrant based on the information's "non-content" nature.⁶²² The FISA Court created a framework to allow for non-content data collection and privacy protection within which the NSA could operate in its data collection efforts.⁶²³

The very nature of the FISA Court undermines much of its ability to oversee effectively the government's actions taken in response to its orders and opinions. This is corroborated by the subsequent declassified Justice Department documents. By 2008, the FISA Court released a supplemental opinion, clarifying that the NSA had the authority to collect the telephony data sought under the PATRIOT Act's revision to the original FISA statute.⁶²⁴

The reason for the clarification became known in the 2009 and 2011 opinions by the FISA Court. Compliance incidents were reported by the NSA; data that had no relation to counterterrorism investigations was caught in NSA's dragnet; and analysts in the NSA were cross-referencing non-content data with other databases that never should legally mingle with the fruits of warrantless data

⁶²² Order, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted] (*In re* FBI Application For Production of Tangible Things from [Redacted] I), No. BR 06-05, at *2 (FISA Ct. May 24, 2006) (Howard, J.), available at https://www.eff.org/sites/default/files/filenode/docket_06-05_1dec201_redacted.ex_-_ocr_0.pdf.

⁶²³ *Id.* at 5-10.

⁶²⁴ Supplemental Opinion, *In re* Production of Tangible Things from [Redacted], No. BR 08-13, at *1 (FISA Ct. Dec. 12, 2008) (Walton, J.), available at https://www.eff.org/sites/default/files/filenode/4_february_2011_production_br10-82_final_redacted.ex_-_ocr_1.pdf.

gathering.⁶²⁵ The FISA court found itself caught in a series of oversights, misrepresentations, and outright lies by the government as it tried to justify its actions to the court.

Finally, the FISA Court ordered a complete review of the NSA program, its oversight and compliance procedures, and any incidents where violations of the 2006 framework occurred. In 2011, just two years after that order, FISA Court declared the NSA's upstream data collection (a sibling of PRISM as discussed, *supra*), a violation of the Fourth Amendment.⁶²⁶ The agency had overstepped its legal bounds severely, acquiring hundreds of millions of communications of persons whose Fourth Amendment rights shielded their data from acquisition prior to a warrant. The NSA did not stop collecting data, however.

Under FISA's watch, "the NSA has captured and stored the *content* of trillions of telephone conversations, texts and emails, and can access that content at the press of a few computer keys."⁶²⁷ Since its inception, the FISA court has been the prime example of a slippery slope. The very legal standard the FISA Act forces upon it has proven disastrously malleable:

⁶²⁵ *In re* Production of Tangible Things from [Redacted], No. BR 08-13 (FISA Ct. Jan. 28, 2009) (order regarding preliminary notice of compliance incident dated January 15, 2009) (Walton, J.), available at https://www.eff.org/sites/default/files/filenode/br_08-13_alert_list_order_1-28-09_final_redacted1.ex_-_ocr_0.pdf; Order, *In re* Production of Tangible Things from [Redacted], No. BR 08-13 (FISA Ct. March 2, 2009) (Walton, J.), available at https://www.eff.org/sites/default/files/filenode/br_08-13_order_3-2-09_final_redacted.ex_-_ocr_1.pdf; Order, *In re* Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things from [Redacted] (*In re* FBI Application For Production of Tangible Things from [Redacted] II), No. BR 09-06 (FISA Ct. June 22, 2009) (Walton, J.), available at https://www.eff.org/sites/default/files/filenode/br_09-06_order_and_supplemental_order_6-22-09_final_redacted.ex_-_ocr_0.pdf.

⁶²⁶ *In re* [CNR], at *16 n.14 (FISA Ct. Oct. 3, 2011) (Bates, J.), available at <http://epic.org/privacy/terrorism/fisa/fisc.html#legal>.

⁶²⁷ Andrew P. Napolitano, *Domestic Spying is Dangerous to Freedom*, FOX NEWS (Aug. 8, 2013), <http://www.foxnews.com/opinion/2013/08/08/domestic-spying-is-dangerous-to-freedom/>.

In 30 years, from 1979 to 2009, the legal standard for searching and seizing private communications—the bar that the Constitution requires the government to meet—was lowered by Congress from probable cause of crime to probable cause of being an agent of a foreign power to probable cause of being a foreign person to probable cause of communicating with a foreign person.⁶²⁸

The judges of the court can keep no record of proceedings before them and can only use NSA pens and phones during proceedings.⁶²⁹ The court is plagued with both systematic and constitutional problems that relate to a fundamental bedrock principle of American judicial process: The adversarial system. The adversarial process by nature tests the veracity of facts in a case and scrutinizes claims. The problem with the FISA Court is that there is absolutely no adversarial process.

This issue is a double-edged sword. First, it corrupts the truth-seeking function of courts; and second, it violates the constitutional requirement of a case or controversy.

As to determinations of veracity or falsity, without adversity, assertions by the government go unchallenged and a judge is left without any basis on which to evaluate the government's assertions. The lack of factual adversity reduces the function of the court to determining matters of law. By being limited in this manner, the court is essentially reduced to applying the law to whatever factual hypothetical the NSA wishes to submit to the court as a government affidavit. As was pointed out by FISA Court Chief Judge Reggie B. Walton, a main problem is that the court can *only* get facts

⁶²⁸ Andrew P. Napolitano, *Liberty in Shambles*, FOX NEWS (June 13, 2013), <http://www.foxnews.com/opinion/2013/06/13/liberty-in-shambles/>.

⁶²⁹ Andrew P. Napolitano, *The Truth Shall Keep Us Free—Edward Snowden has Awakened a Giant*, FOX NEWS (June 27, 2013), <http://www.foxnews.com/opinion/2013/06/27/truth-shall-keep-us-free/>.

from the NSA.⁶³⁰ This is the same agency that, as discussed above, Judge Bates admonished in an opinion for lying in *FISA court submissions* to an extent that is criminal. This lack of adversity corrupts the truth-seeking function of courts of law—an ethical and legal duty assigned to judges.

Realizing the obvious issues of truth-seeking that comes from a court blindly accepting the assertions of one party without even hearing from the other, not to mention the potential abuses of judicial power that could arise out of such a scheme, the Framers of the Constitution “wrote into Article III of the Constitution the absolute prerequisite of the existence of a case or controversy before the jurisdiction of any federal court could be invoked.”⁶³¹

This requirement has been guarded by the Supreme Court consistently since the adoption of the Constitution, and the decisions of the Supreme Court have circumscribed what is a case or controversy. The Case or Controversy Clause typically relates to the constitutional requirement of proving injury-in-fact to demonstrate standing. However, the concern here is even more fundamental. The FISA Court doesn’t even hear controversies or cases. The “actual controversy” rule means that cases which are unripe (no controversy has yet arisen), moot (controversy is resolved), or in which the opinion would be tantamount to an advisory opinion may not be adjudicated. Advisory opinions are like those issued by the OLC of the Justice Department—they are untested by legal adversity and are positive statements meant to guide, not to resolve a matter at hand.

Without even the contemplation of an adverse party, every matter brought before the FISA Court is advisory. There is no criminal defendant or *ex parte* proceeding with the party in an adverse

⁶³⁰ Andrew P. Napolitano, *Spying and Lying*, FOX NEWS (Sept. 19, 2013), <http://www.foxnews.com/opinion/2013/09/19/spying-and-lying/>.

⁶³¹ Andrew P. Napolitano, *Is the FISA Court Constitutional?*, FOX NEWS (Sept. 26, 2013), <http://www.foxnews.com/opinion/2013/09/26/is-fisa-court-constitutional/>.

state; there is no civil suit with a plaintiff or a defendant with an amount in controversy. There is the government, submitting uncontested facts, and receiving an opinion which rubber-stamps its requests. The longstanding rule, since at least the 1937 case *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, has been that the existence of *adversity* in the case or controversy before the court is a predicate to the exercise of Article III power by the judicial branch.⁶³²

Recently, the decision in *United States v. Windsor* has cast considerable doubt on the validity of that inference, as the majority considered adversity a prudential matter rather than a constitutional requirement in order to avoid the inevitable conclusion that because the government and the adverse party desired the same outcome, they were not adverse and thus, there was no case or controversy.⁶³³ The *Windsor* majority stressed the amount of amicus briefs before the court as a substitute for the adversity of the parties themselves. As the FISA court has no amicus filings, nor even gives the other party the opportunity to submit briefing, the *Windsor* holding is not fatal to this argument as it is so distinguishable.

Without putting too fine a point on it, the Supreme Court has significantly more exposure to the disinfecting sunlight of public

⁶³² *United States v. Windsor*, S. Ct. 2675, 2701 (2013) (Roberts, C.J., dissenting) (“I find it wryly amusing that the majority seeks to dismiss the requirement of party-adverseness as nothing more than a “prudential” aspect of the sole Article III requirement of standing.”); *GTE Sylvania, Inc. v. Consumers Union of U. S., Inc.*, 445 U.S. 375, 382-83 (1980) (“The purpose of the case-or-controversy requirement is to “limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.” The clash of adverse parties ““sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions.”” Accordingly, there is no Art. III case or controversy when the parties desire ‘precisely the same result.’” (citations omitted)); see also *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 121 (1998) (Stevens, J., concurring); *Raines v. Byrd*, 521 U.S. 811, 839-40, (1997) (Breyer, J., dissenting); *Ass’n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 151-52 (1970); *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240-41 (1937)).

⁶³³ *Windsor*, 133 S. Ct. at 2687.

scrutiny and input than the FISA court system. Moreover, the FISA court is a perfect example of the bad results that can occur when eroding the requirement of adversity as a prerequisite for application of the judicial power. Thus, the *Windsor* aberration from the longstanding rule of adversity as an absolute prerequisite to the reach of the judicial power likely will not stand the test of time.

This reasoning works in reverse as well: If the FISA court doesn't rubber-stamp the government's submissions, then "those court orders are non-binding and the government has ignored them."⁶³⁴ As I have previously argued: "Unenforceable rulings that may be disregarded by another branch of the government are not judicial decisions at all, but impermissible advisory opinions prohibited by the Framers." A non-binding opinion, issued in secret, to one party, based solely on its version of the facts, with no test of credibility, is mere advice and an opinion in the literal sense of the word, not the legal sense of a disposition of a valid claim by a federal judge.

The constitutional bias in favor freedom, at the expense of even the state's police power, has been eroded over the past century and has culminated in the current, creepy super-state.

5. *Court Decisions on the NSA's Data Dragnet*

Recently, two district courts have ruled on the constitutionality of the NSA's spying program. One court found it constitutional, another found it unconstitutional. In *Klayman v. Obama*, Judge Richard J. Leon of the D.C. District Court granted a preliminary injunction of the NSA program because the plaintiffs demonstrated a substantial likelihood of success on the merits for their Fourth Amendment claims. In *American Civil Liberties Union v. Clapper*, Judge William H. Pauley III of the Southern District of New York

⁶³⁴ Napolitano, *supra* note 631.

dismissed a petition to enjoin the government from its bulk collection of telephony metadata.

In *Klayman*, Judge Leon began by noting the unprecedented scope of what the government was doing, and how the current case law did not even contemplate the sheer breadth of the government's electronic reach: "[T]he almost-Orwellian technology that enables the Government to store and analyze the phone metadata of every telephone user in the United States is unlike anything that could have been conceived. . . ." ⁶³⁵

Applying a totality of circumstances analysis, Judge Leon held that the plaintiffs were substantially likely to succeed, even if the government claimed a "special needs" exception to the Fourth Amendment warrant requirement: "The doctrine has also been applied in cases involving efforts to prevent acts of terrorism in crowded transportation centers. To my knowledge, however, no court has ever recognized a special need sufficient to justify continuous, daily searches of virtually every American citizen without any particularized suspicion. In effect, the Government urges me to be the first non-FISC judge to sanction such a dragnet." ⁶³⁶ The judge held that taking the whole circumstances into account—terrorism, the efficiency of the program, and the privacy interest of the plaintiffs—the program was likely unconstitutional. ⁶³⁷ Moreover, "the utter lack of evidence that a terrorist attack has [been exposed creates] . . . serious doubts about the efficacy of the metadata collection program as a means of conducting time-sensitive investigations in cases involving imminent threats of terrorism." ⁶³⁸

In *American Civil Liberties Union v. Clapper*, Judge Pauley reached the opposite conclusion that Judge Leon did, relying on the

⁶³⁵ *Klayman v. Obama*, CV 13-0881 (RJL), 2013 WL 6598728 at *20 (D.D.C. Dec. 16, 2013).

⁶³⁶ *Id.* at *22.

⁶³⁷ *Id.* at *24.

⁶³⁸ *Id.*

third party doctrine. The Third Party Doctrine is an outdated rule in Fourth Amendment law which states that once a piece of information or data is given to a third party, like a medical record or a business record including personal data, the owner of that piece of information has no further legitimate privacy interest in that piece of information.⁶³⁹ Consequently, Judge Pauly held that “the business records created by Verizon are not ‘Plaintiffs’ call records.’ Those records are created and maintained by the telecommunications provider, not the ACLU. Under the Constitution, that distinction is critical because when a person voluntarily conveys information to a third party, he forfeits his right to privacy in the information.”⁶⁴⁰

When the D.C. and Second Circuits hear the inevitable appeals from these cases, they as well may split or rule against the government. A circuit split over so fundamental a question cannot be ignored by the Supreme Court for long. In *United States v. Jones*, five justices filed concurring opinions to Justice Antonin Scalia’s approach of Fourth Amendment analysis. In light of the massive government intrusion into privacy as of late, Justice Sonia Sotomayor’s description of the privacy harms rings ever more true:

This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. . . . I for one doubt that people would accept without complaint the warrant-

⁶³⁹ See *Am. Civil Liberties Union v. Clapper*, 13 CIV. 3994, 2013 WL 6819708, at *21-22 (S.D.N.Y. Dec. 27, 2013).

⁶⁴⁰ *Id.* at *21.

less disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy.⁶⁴¹

While Justice Samuel Alito and the other more liberal justices on the court concurring separately, it is likely the Justices will at least grant certiorari and evaluate the Third Party doctrine as part of their analysis, perhaps even reaching a compromise majority.

6. *President Obama's NSA Reforms*

On January 17, 2014, President Obama introduced a series of NSA spying privacy "reforms" his administration will work towards institutionalizing in the future. These reforms can be succinctly described as too little, too late. The Electronic Frontier Foundation gave the Obama's reforms a 3.5/12 rating when "stack[ed] up against 12 common sense fixes that should be a minimum for reforming NSA surveillance."⁶⁴²

Obama's reform promise to do the following: "end the bulk collection of domestic phone records 'as it currently exists [pursuant to PATRIOT Act Section 215]'"⁶⁴³; abrogate the use of National Securi-

⁶⁴¹ United States v. Jones, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

⁶⁴² Cindy Cohn & Parker Higgins, *Rating Obama's NSA Reform Plan: EFF Scorecard Explained*, ELECTRONIC FRONTIER FOUNDATION (Jan. 17, 2014), <https://www.eff.org/deeplinks/2014/01/rating-obamas-nsa-reform-plan-eff-scorecard-explained>.

⁶⁴³ *Id.*; Tom McCarthy, *Obama Announces New Limits on NSA Surveillance Programs – Live Reaction*, THE GUARDIAN (Jan. 17, 2014, 5:16 PM), <http://www.theguardian.com/world/2014/jan/17/obama-nsa-surveillance-reforms-speech-live#block-52d9a73be4b040bca45b4aa7> (quoting President Obama, Address at the Justice Department, Washington, D.C. (Jan. 17, 2014)). See generally Andrew P. Napolitano, *A presidential placebo – Obama's Massive NSA Spying Program Still Alive and Well*, FOX

ty Letters (gag order records demands)⁶⁴⁴; lessening spying on foreigners⁶⁴⁵; and, reforming the FISA court while opposing the deplorable FISA Improvements Act.⁶⁴⁶

As the Electronic Frontier Foundation points out, this does nothing to stop the NSA from continuously undermining internet security through breaking encryption and security safeguards.⁶⁴⁷ President Obama has not rejected the Third Party Doctrine, nor “embrace[d] meaningful transparency reform.”⁶⁴⁸ Information obtained can still be used against criminal defendants without showing it to them.⁶⁴⁹ And most importantly, the trove of data the government has collected over the last decade isn't going to be destroyed, as it should be; instead, it may be transferred into someone else's custody. In the grand scheme of things, these reforms are meaningless and maintain the hallmarks of a totalitarian government.

CONCLUSION

Overall, the historical record we have examined gives a less than satisfactory view of federal regard for civil liberties when it comes to matters of national security. Rights to trial, free speech, privacy, to be secure in one's home, to be free from indefinite detention, to fairness from the government, and many others have been sacrificed in the name of “security;” often for the satisfaction of the majority rather than for an actual national security need.

NEWS (Jan. 23, 2014), <http://www.foxnews.com/opinion/2014/01/23/presidential-placebo-obama-massive-nsa-spying-program-still-alive-and-well/>.

⁶⁴⁴ Cohn & Higgins, *supra* note 643.

⁶⁴⁵ *Id.*

⁶⁴⁶ Cohn & Higgins, *supra* note 643. *See generally* FISA Improvements Act of 2013, S. Res. 1631, 113th Cong. § 6 (2013) (codifying the pre-Snowden NSA standards as the acceptable standards for performing metadata search queries).

⁶⁴⁷ Cohn & Higgins, *supra* note 643.

⁶⁴⁸ *Id.*

⁶⁴⁹ *Id.*

With respect to the three rights specifically addressed in this article, the historical record demonstrates the need for serious and specific concerns if we are to be a free people. The attacks on the Freedom of Speech, the “oldest” of these constitutional norms, began in 1798, became a nationwide and prominent issue between World War I and the Cold War, and generally were corrected by the Warren Court.

As to due process, the battle over the right to a civilian trial is still ongoing, but generally has been expanded since the days of President Lincoln. This battle has also come front and center in the Global War on Terror, with the judicial recognition of the due process rights of non-state actors engaged in combat against American troops. The detention of enemy combatants at Gitmo and other military bases has brought the vitality of military jurisdiction and military commissions to the forefront of jurisprudence in the cases of *Hamdan* and *Padilla*, tipping off a continuing disagreement between Congress, and the President, and the Supreme Court.

With the right to privacy, however, the historical trend seems to be in the opposite direction. Governmental assaults on privacy began a while ago with less discrete violations, similar to President Adam’s pinprick incursions on speech in the late 1790s, but eventually developed into a massive, nationwide, pressing issue because of the extreme and shocking breadth of the government’s massive reach.

It is probable that the current Supreme Court will arrive at a fundamental and necessary reimagining of the Third Party Doctrine and the Fourth Amendment jurisprudence that permits the sort of twisted executive reasoning described in this work. Justice Sotomayor, who has not shied away from finding constitutional theories to uphold the constitutional excesses of Big Government, recently revealed an inclination to engage in recovering lost privacy protections through this jurisprudence in *United States v. Jones*:

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third par-

ties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks, [and moreover, the Court should] not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.⁶⁵⁰

And Justice Scalia himself, who has argued for a textualist reading of the Fourth Amendment—that is, it *only* protects persons, houses, papers, and effects—paused poignantly and emitted a “gotcha” smile when asked recently in public if a computer chip in a cell phone or a desktop is an “effect” under the Fourth Amendment.⁶⁵¹

Is the postman entitled to read your mail just because you gave him a letter to deliver? Is Verizon entitled to listen to your telephone conversations and tell the feds what it heard just because you used its equipment to conduct them? Can Google tell the feds all you have emailed just because you used Google’s servers? Could the Fourth Amendment possibly permit this?

While the court has shown a willingness to intervene and is poised to make substantial strides in the area of privacy protections, there is still a significant chance the law could go the other way; yet the law’s reasonable expectation standard lets your neighbors sacrifice your freedom.

Americans must be vigilant to protect our freedoms, particularly in times of fear and exigency, because ultimately, individuals can only surrender their own natural rights. If the Constitution means what it says, the rights it was written to protect from assault by the government belong to individuals, not to the majority; and they are

⁶⁵⁰ United States v. Jones, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring).

⁶⁵¹ An Evening With Supreme Court Justice Antonin Scalia, A Brooklyn Law School-Sponsored Public Colloquium, Brooklyn Academy of Music (Mar. 21, 2014).

as vibrant and necessary and worthy of protection in bad times as they are in good times.